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Status: GRANTED

Title: Texas State Teachers Association, et al.,
Petitioners
v.
Garland Independent School District, et al.

Docketed:
April 25, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Chanin,Robert H.

Counsel for respondent: Luna,Earl

Entry	Date	Note	Proceedings and Orders
1	Apr 25 1988	G	Petition for writ of certiorari filed.
3	May 23 1988		Order extending time to file response to petition until June 28, 1988.
4	Jun 23 1988		Brief of respondents Garland Independent School District, et al. in opposition filed.
5	Jun 28 1988		DISTRIBUTED. September 26, 1988
6	Jul 5 1988	X	Reply brief of petitioners Texas State Teachers Assn., et al. filed.
7	Oct 3 1988		Petition GRANTED.
			**********
8	Oct 21 1988		Record filed.
		*	Certified copy of original record & proceedings, 6 volumes, received. (BOX).
10	Nov 1 1988		Order extending time to file brief of petitioner on the merits until November 30, 1988.
11	Nov 30 1988		Joint appendix filed.
12	Nov 30 1988		Brief of petitioner Texas State Teachers Assn. filed.
14	Dec 3 1988		Order extending time to file brief of respondent on the merits until January 21, 1989.
15	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 1, 1989. (1ST CASE.)
16	Jan 17 1989		Brief of respondents Garland Independent School District, et al. filed.
17	Jan 24 1989		CIRCULATED.
18	Feb 6 1989	G	Motion of Texas Association of School Boards, et al. for leave to file a brief as amici curiae filed.
19	Feb 21 1989		Motion of Texas Association of School Boards, et al. for leave to file a brief as amici curiae GRANTED.
20	Feb 21 1989	X	Reply brief of petitioner Texas State Teachers Assn. filed.
21	Mar 1 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1759

Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Is a plaintiff who obtains judgment in his favor on a significant claim in a civil rights lawsuit precluded from recovering attorney's fees under 42 U.S.C. § 1988 if the court determines that the claim on which he prevailed was not the "central issue" in the litigation?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties were defendants-appellees in the court below: Eli Douglas, Superintendent of the Garland Independent School District; the Board of Trustees of the Garland Independent School District; and the members thereof, to wit, Harris Hill, Donald Senter, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M.D. Williams IV.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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No. ——

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TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

———

Texas State Teachers Association, Garland Education Association, Joe Atkins and Janice Hill petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought, which affirmed the district court's decision denying attorney's fees, is reported at 837 F.2d 190 and is reproduced in the Appendix at App. 1a-15a. The opinion of the district court with respect to the application for attorney's fees is unreported and is reproduced at

App. 16a-20a. The prior opinion of the Court of Appeals on the merits is reported at 777 F.2d 1046 and is reproduced at App. 21a-38a. This Court's order summarily affirming that decision is reported at 107 S. Ct. 41 and is reproduced at App. 39a. The decision of the district court on the merits is unreported and is reproduced at App. 40a-60a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1988 (App. 61a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Introduction

This case involves a policy adopted by respondent school district which, *inter alia*, prohibited private conversations between teachers regarding employee organizations at any time during the school day (even during lunch and other non-class time), and teacher use of a school's internal mail system and bulletin boards for communications regarding this subject (even though teachers were allowed to use these facilities for communications regarding any other subject). Petitioners succeeded in having these prohibitions declared unconstitutional as a violation of their First and Fourteenth Amendment rights.

Conceding that petitioners "did succeed on significant secondary issues," a divided panel of the Court of Appeals nonetheless held that they were not "prevailing parties," and thus were precluded from recovering *any* attorney's fees. Although eleven other circuits have held that a civil rights plaintiff may recover fees if he has prevailed on "any significant issue" in the litigation, the Court of Appeals in this case adhered to the markedly narrower standard that has been adopted by the Fifth and Eleventh Circuits, under which such a plaintiff cannot be awarded fees unless he prevailed on "the central issue" in the litigation. The court concluded that although petitioners had succeeded in invalidating respondents' ban on speech concerning employee organizations as it applied to the school district's own teachers, they had not succeeded in opening the school district's campuses and communication facilities to outside representatives of such organizations—which, according to the court, constituted "the central issue" in this litigation. Judge Goldberg dissented, expressing the "hope that the Supreme Court will grant certiorari in this case [and] resolve this split in circuits" regarding the standard a plaintiff must satisfy to qualify as a "prevailing party" eligible for an award of attorney's fees under the Federal civil rights laws.

Statement

Respondent Garland Independent School District ("GISD"), a public school district in Texas, adopted a policy, principally expressed in its Administrative Regulation 412 ("Regulation"), designed to prohibit communications by or with teachers during the school day concerning employee organizations.[1]

"GISD policy, as expressed in Administrative Regulation 412, affect[ed] two different classes of communica-

---

[1] The term "employee organization" was defined to include any organization whose main purpose was to represent a group of employees in matters of employment practices and procedures.

tions: (1) communications instigated by outside representatives of [employee organizations] who desire access to teachers and school communication facilities; and (2) communications among GISD teachers employed by the schools." *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046, 1050 (5th Cir. 1985), *aff'd mem.*, —— U.S. ——, 107 S. Ct. 41 (1986) ("*Garland I*") (App. 26a).

As applied to outside representatives, GISD's policy prohibited them from having access to school grounds during school hours, and from using school communications facilities for the dissemination of information concerning employee organizations. *Id.* at 1048-49 (App. 22a-24a). As applied to GISD's own teachers, it was acknowledged that the policy prohibited a teacher from discussing employee organizations "if, in [the school officials'] view, such discussion amounted to 'promoting' the organization," *id.* at 1054 (App. 34a); and as the Court of Appeals observed, the prohibition in fact extended even further: "[t]he evidence indicates that school officials interpret Admin. Reg. 412 as prohibiting *any* discussions among teachers relating to . . . any teacher organization that occur on school premises during school hours, even though those discussions occur during lunch hour or other non-class time." *Id.* at 1053 (App. 32a) (emphasis by the court). GISD's policy also prohibited teachers from using the internal mail system and bulletin boards to communicate regarding employee organizations: "GISD allow[ed] teachers to [use these facilities] to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations." *Id.* at 1055 (App. 37a).

GISD's ban on speech concerning employee organizations, as applied both to outside representatives and to GISD teachers, was challenged by the petitioners: Texas State Teachers Association ("TSTA"), a voluntary membership organization that is classified as an "employee organization" for purposes of GISD's policy; Garland

Education Association ("GEA"), one of TSTA's local affiliates, which is also considered an "employee organization";[2] Joe Atkins, an employee of TSTA; and Janice Hill, a GISD teacher who is a member of TSTA and president of GEA. Their complaint, filed under 42 U.S.C. § 1983 against GISD, the members of GISD's Board of Trustees, and its Superintendent, alleged that the Regulation violated the First and Fourteenth Amendments.

The District Court granted summary judgment for respondents (App. 40a-60a), upholding the Regulation except in one respect not pertinent here (App. 58a). On appeal, the Fifth Circuit affirmed the District Court's decision as it pertained to outside representatives of employee organizations, 777 F.2d at 1050-53 (App. 27a-31a); but the court "reverse[d] that part of the summary judgment which uph[eld] Administrative Regulation 412's application to private teacher conversations and use of school media facilities by teachers employed in GISD schools. . . ." 777 F.2d at 1055-56 (App. 38a). The court "grant[ed] [petitioners'] motion for partial summary judgment holding the application of the Regulation to these activities unconstitutional." *Id.* at 1056 (App. 38a).

This outcome represented a clear and significant defeat for GISD. In its brief to the Fifth Circuit, GISD had emphatically urged the Court of Appeals to uphold the Regulation not only as applied to outside representatives, but as applied to the teachers as well, asserting that if the Regulation were sustained with respect to the former group but were struck down as applied to the latter, this "would be letting the employee organizations accomplish through the back door what they cannot accomplish through the front door." Brief for Defendants-Appellees at 39, *Garland I*, *supra*. When the Court of Appeals reached precisely that result, respondents took

[2] TSTA and GEA sued on their own behalf and on behalf of their members.

every possible step to overturn the decision. They filed a Petition for Rehearing and a Suggestion for Rehearing En Banc; and when the Petition and Suggestion were denied, 784 F.2d 1113 (5th Cir. 1986), respondents filed in the Court of Appeals a Motion for Stay of Enforcement and/or Recall of Mandate, asserting that "[t]he failure to grant this motion would require the changing of policies and procedures and training sessions for employees on approximately fifty (50) campuses." Motion for Stay of Enforcement and/or Recall of Mandate at 2, *Garland I*, *supra*. Petitioners filed an opposition to that motion, and the Court of Appeals denied the motion by order entered March 26, 1986. Respondents thereupon filed a motion in this Court for a stay, which was denied per order of Justice White. Respondents appealed the Fifth Circuit's judgment to this Court, and petitioners filed a Motion to Dismiss or Affirm. On October 6, 1986, this Court summarily affirmed the Court of Appeals' judgment, —— U.S. ——, 107 S. Ct. 41 (App. 39a), thus finally putting an end to GISD's vigorous efforts to overturn that judgment.

Petitioners then moved in the District Court for an award of attorney's fees pursuant to 42 U.S.C. § 1988. The District Court denied the fee request in its entirety, holding that although plaintiffs had achieved "partial success," they had not prevailed on "the central issue" in the litigation (App. 16a-20a). That issue, according to the District Court, was the constitutionality of the Regulation as applied to outside representatives of employee organizations.

A divided panel of the Court of Appeals affirmed the denial of fees. Acknowledging that other courts have defined "prevailing parties" as those who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," 837 F.2d at 192 (App. 5a), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Court of Appeals declared that "[o]ur definition is narrower. . . . We have held that

the test for 'prevailing party' status as it applies to plaintiffs is 'whether the plaintiff prevailed on the central issue by acquiring the primary relief sought.'" 837 F.2d at 192 (App. 5a), quoting *Simien v. City of San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987). The court affirmed the denial of fees on this basis, 837 F.2d at 192-193 (App. 6a):

> Applying this Court's definition of 'prevailing party' to the facts of this case, we agree with the conclusion of the district court that appellants did not succeed on the central issue of their suit and did not obtain the primary relief sought. The main thrust of this lawsuit was appellants' attempt to open up GISD school campuses during school hours to outside representatives of employee organizations like TSTA and GEA and to allow such organizations the use of school communication facilities. Appellants failed in this attempt, and this was the primary relief sought in this lawsuit. Granted, appellants did succeed on significant secondary issues by having Regulation 412 declared unconstitutional as it applied to teacher to teacher conversation and teacher use of school communications systems. But this was not the primary relief sought. The central issue in this case was employee organization access to GISD campuses, not internal teacher communication within those campuses.

Judge Goldberg dissented, stating that "[b]y adhering to the law of this Circuit, the majority persists in an approach to the prevailing party standard that has been rejected by all but one of the other circuits, flies in the face of Supreme Court precedent and is inconsistent with the legislative purpose in enacting § 1988." *Id.* at 193 (App. 7a). Judge Goldberg concluded, *id.* at 197 (App. 15a):

> I profoundly hope that the Supreme Court will grant certiorari in this case [and] resolve this split in circuits in favor of the generous formulation endorsed in *Hensley*.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ACKNOWLEDGED CIRCUIT CONFLICT ON A QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE.

The decision in this case is squarely in conflict with the decisions of other circuits regarding the standard a plaintiff must satisfy to qualify as a "prevailing party" eligible for an award of attorney's fees under the Federal civil rights laws.[3]

A. The Court of Appeals majority acknowledged in this case that "[o]ur definition of 'prevailing party' is narrower than that of some of the other Federal appellate courts". 837 F.2d at 192 (App. 5a). More precisely, as Judge Goldberg observed in dissent, only one other circuit—the Eleventh—follows the "central issue" test applied by the Fifth Circuit.[4] The other eleven circuits have all adopted a more generous formulation, initially articulated by the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978), under which plaintiffs qualify as prevailing parties "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *See*

[3] This case arises under 42 U.S.C. § 1988, which by its terms governs fee awards under 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986, as well as under title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* A construction of the term "prevailing party" under § 1988 would also be controlling with respect to the fee provision of title VII of the 1964 Act, 42 U.S.C. § 2000e-5(k), see *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983), and might well be "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Id.*

[4] See *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (*en banc*). The Eleventh Circuit's adoption of the Fifth Circuit's approach reflects the Eleventh Circuit's policy of adhering to Fifth Circuit precedent that existed when the Eleventh Circuit was established. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Miller v. Staats, 706 F.2d 336, 340-41 (D.C. Cir. 1983); *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984); *Abraham v. Pakarski*, 728 F.2d 167, 175 (3d Cir.), *cert. denied*, 467 U.S. 1242 (1984); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979); *Kreimes v. Department of Treasury*, 764 F.2d 1186, 1188-90 (6th Cir. 1985); *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1032 (8th Cir. 1984) (*en banc*); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983); *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir. 1984); *Austin v. Department of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984).[5]

[5] Of these eleven circuits, nine have adopted the *Nadeau* test verbatim. See cases cited in text, *supra*, from the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Federal Circuits. The Third Circuit has formulated essentially the same test in slightly different words: "[t]he standard used in this circuit for determining a plaintiff's prevailing party status is whether plaintiff achieved 'some of the benefit sought' by the party bringing the suit." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910 (3d Cir. 1985), quoting *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983). As the Third Circuit has noted, "the language of [its] standard is, in fact, a virtual quotation of a portion of *Nadeau*" and is "close[ly] similar[]" to the *Nadeau* formulation. *Institutionalized Juveniles*, *supra*, 758 F.2d at 911. The language used by the D.C. Circuit also differs in minor respects from the *Nadeau* formulation, but is, if anything, more generous; the D.C. Circuit defines a prevailing plaintiff as one who has "received any benefit at all" from the litigation. *Miller v. Staats*, *supra*, 706 F.2d at 341 n.30. It cannot be gainsaid that all eleven of these circuits are in conflict with the "central issue" requirement of the Fifth and Eleventh Circuits.

The sharp conflict between the definition of "prevailing party" applied in the Fifth and Eleventh Circuits and the definition applied in the other circuits has been noted by the commentators. *See* M. Schwartz and J. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* 340-41 (1985) ("Schwartz and Kirklin"); M. Derfner and A. Wolf, *Court Awarded Attorney Fees* ¶ 8.03 at 8-19 (1988) ("Derfner and Wolf").

Under the definition applied in every circuit but the Fifth and Eleventh, petitioners would unquestionably have been held to be prevailing parties in this case; for it is, if anything, an understatement to acknowledge, as the Court of Appeals did, that petitioners "did succeed on significant secondary issues" in this litigation. 837 F.2d at 193 (App. 6a), quoted at p. 7 *supra*. Indeed, petitioners' success was so substantial as to prompt an appeal by respondents to this Court, not to mention two stay motions and a petition for rehearing, in which respondents failed in their attempts to overturn petitioners' victory. See p. 6 *supra*. Only in the Fifth and Eleventh Circuits could a civil rights plaintiff who achieved that degree of success be deemed not to have "prevailed," and be foreclosed from receiving any award of fees.

There is no prospect that the Fifth Circuit will modify its views of its own accord to conform with the law applied in the other circuits on this issue. As Judge Goldberg observed in his dissent, 837 F.2d at 195 (App. 11a-12a):

> This Circuit when faced with . . . the non-conformity of [the central issue test] with Supreme Court precedent and the rejection of the central issue approach by every circuit faced with the question since *Hensley*, has steadfastly refused to review the question en banc. *Uviedo v. Steves Sash & Door Co.*, 760 F.2d 87, 88 (5th Cir. 1985) (Rubin, J. dissenting from denial of a Suggestion for Rehearing En Banc). If this federal statute is to be uniformly applied, the Supreme Court must grant certiorari in order to resolve this split in circuits.

B. Nor can there be any doubt that this circuit conflict concerns an issue of great public importance. " "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." " *City of Riverside v. Rivera*, 477 U.S. 561, 106

S. Ct. 2686, 2695 (1986) (plurality opinion), quoting H.R. Rep. No. 94-1558, p. 2 (1976). And, Congress has determined that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *City of Riverside, supra*, 106 S. Ct. at 2696 (plurality opinion), quoting S. Rep. No. 94-1011, p. 2 (1976).

It is therefore imperative that the circuits follow a correct and consistent approach in determining when attorney's fees will be available to civil rights plaintiffs. But as matters now stand, two circuits, which entertain more than 20% of the civil rights cases filed in the federal courts,[6] apply a much more restrictive test than is applied by the other eleven circuits; and this Court may take judicial notice that civil rights litigation in the Fifth and Eleventh Circuits includes many ongoing institutional cases such as school desegregation cases, where, as Judge Goldberg pointed out, 837 F.2d at 196 (App. 13a-14a), the narrow central-issue test has its most onerous application.

Thus, the circuit conflict presented here involves a recurring issue[7] of exceptional importance, and should not be left unresolved.

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[6] See the Annual Report of the Director of the Administrative Office of the U.S. Courts for the Twelve Month Period Ended June 30, 1987, Appendix I, Table C3A, pp. 28-31, which shows that of the civil rights cases pending in the district courts as of June 30, 1987 (including both "United States cases" and "private cases"), 21% were pending in the Fifth and Eleventh Circuits.

[7] There are over 25,000 civil rights cases pending in the federal district courts. See the tables cited in n.6 *supra*. The need to determine whether the plaintiff is a "prevailing party" arises in thousands of those cases, and in cases under other statutes as well. See n.3 *supra*.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HENSLEY v. ECKERHART*.

The basic subject involved in this case—the analysis that should be applied to a request for attorney's fees when the plaintiff has been successful on certain issues in the litigation but has been unsuccessful on others—was addressed by this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The central-issue test adopted by the Fifth and Eleventh Circuits conflicts with this Court's teaching in that case.

At the outset of its opinion, the *Hensley* Court quoted with evident approval the definition of "prevailing party" articulated in *Nadeau v. Helgemoe, supra*. The Court stated, 461 U.S. at 433:

> A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988.[7] The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA 1 1978).[8] This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."
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> • • • •
>
> [8] See also *Busche v. Burkee*, 649 F.2d 509, 521 (CA7 1981), *cert. denied*, 454 U.S. 897 (1981); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897-898 (CA9 1979) (*per curiam*). *Cf. Taylor v. Sterrett*, 640 F.2d 663, 669 (CA5 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought").

Several circuits have understood this passage to indicate this Court's adoption of the *Nadeau* test.[8] The Fifth Circuit, on the other hand, stated in its decision here that "[i]n *Hensley*, the Supreme Court merely accepted the 'generous formulation' of the 'prevailing party' definition found in some of the circuits but did not hold it to be the only correct definition." 837 F.2d at 192 (App. 5a-6a).

Whether or not the passage from *Hensley* quoted above, with its "cf." citation to a Fifth Circuit decision articulating the central-issue test, may fairly be subject to conflicting interpretations,[9] for the reasons that follow we submit that the thrust of the Court's analysis in *Hensley* cannot in any event be reconciled with the central-issue test adopted by the Fifth and Eleventh Circuits.

In *Hensley* the Court stated that the "prevailing party" requirement is intended to be a "generous" one which "brings the plaintiff only across the statutory threshold," 461 U.S. at 433; and the Court noted that a plaintiff may "[be] deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Id.* at 434. Indeed, *Hensley* explicitly contemplates that plaintiffs who

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[8] See *Fast v. School Dist. of City of Ladue, supra*, 728 F.2d at 1032 and n.2; *Gingras v. Lloyd, supra*, 740 F.2d at 212; *Lummi Indian Tribe v. Oltman, supra*, 720 F.2d at 1125; *In re Kansas Congressional Dists. Reapportionment Cases, supra*, 745 F.2d at 612. The Third Circuit, while stating that "the Supreme Court did not prescribe one uniform articulation of the prevailing party standard in *Hensley*," has held that *Hensley* requires the rejection of any standard that is "patently inconsistent with the Court's 'typical' formulation [*i.e.*, the *Nadeau* test]." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 911 (3d Cir. 1985).

[9] The opinion of Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, concurring in part and dissenting in part in *Hensley*, appears to characterize the majority's quotation of the *Nadeau* standard as part of the holding in the case. See 461 U.S. at 441.

have achieved "only partial or limited success" will recover attorney's fees. *Id.* at 436. As an illustration of this point the Court explained that such a situation would have been presented had the *Hensley* plaintiffs "prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive. . . ." *Id.* Significantly, the claim to which the Court referred was a relatively minor aspect of the *Hensley* litigation (see *id.* at 427, n. 1), and certainly could not be said to constitute the "central issue" in the case; yet this Court made it clear that even if the plaintiffs had prevailed on only that single claim they would have been eligible for an award of attorney's fees (albeit at a level that did not include payment for every hour spent on the litigation).[10]

Under *Hensley*, the extent of the "results obtained," *id.* at 434, does not affect the "generous . . . threshold [test]," *id.* at 433, of *eligibility* for an award of attorney's fees, but is rather "[one of the] considerations that may lead the district court to adjust the fee upward or

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[10] Similarly, this Court's discussion in *Hensley* of the Eighth Circuit's decision in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978), clearly indicates that the plaintiff in *Brown* was entitled to a fee award even though she "had lost on the major issue" and had "obtained only a minor part of the relief she sought." See 461 U.S. at 438-439, n.14. And, in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Court, in holding that attorney's fees under § 1988 may be awarded *pendente lite*, quoted legislative history stating that such fees are "especially appropriate where a party has prevailed on an *important* matter in the course of litigation, *even when he ultimately does not prevail on all issues.*" *Id.* at 757, quoting S. Rep. No. 94-1011, p. 5 (1976) (emphasis added). If it is "especially appropriate" for a plaintiff to receive fees *pendente lite* for having prevailed on any "important matter," surely a plaintiff who has received a *final judgment* in his favor on such a matter cannot be disqualified from a fee award merely because the "important matter" on which he prevailed was not "the central issue" in the litigation.

downward. . . ." *Id.* at 434.[11] As Judge Goldberg put it in his dissent, 837 F.2d at 193 (App. 8a), "[u]nder *Hensley* the degree of success goes to the amount of an award, not to the propriety of that award."[12]

We therefore submit that the "central issue" test cannot be reconciled with this Court's analysis in *Hensley*. This consideration buttresses the need for a grant of certiorari to resolve the circuit conflict presented by this case.

III. THE DECISION BELOW IS CONTRARY TO CONGRESSIONAL INTENT AND SOUND JUDICIAL ADMINISTRATION.

As previously indicated, Congress' purpose in enacting the Civil Rights Attorney's Fees Awards Act was to enable plaintiffs to recover fees when they have succeeded, as "private attorneys general," in enforcing the civil rights laws, thus "vindicating a policy that Congress considered of the highest importance." *City of Riverside v. Rivera*, *supra*, 106 S. Ct. at 2695 (plurality opinion) (quoting legislative history). See pp. 10-11 *supra*. There can be no dispute that petitioners accomplished precisely that in this litigation: they succeeded in demonstrating that respondents' policy, as applied to GISD teachers, vio-

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[11] The Court explained in *Hensley* that where a plaintiff has achieved only partial success, the amount of the fee may be adjusted to reflect that fact, depending on the answers to two questions. "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* See also *id.* at 440 (summarizing the holding on these points).

[12] See also Derfner and Wolf, *supra*, ¶ 8.03 at 8-19 (*Hensley* "spelled out strict computation rules which [the Court] found necessary because of the ease with which one could become a prevailing party under [the *Nadeau* definition applied by the Court]").

lated the First and Fourteenth Amendments in important respects.

If no other claims had been asserted in this litigation, petitioners unquestionably would have received an award of fees, even in the Fifth Circuit. But because the litigation also involved *additional* claims, as to which petitioners were unsuccessful, the Court of Appeals held that petitioners must be denied fees altogether. As Judge Goldberg cogently explained in his dissent, 837 F.2d at 196-197 (App. 15a), this approach, under which a civil rights plaintiff who has vindicated important public policies is disqualified from a fee award if the plaintiff's success falls short of what he personally sought to achieve, makes no sense in light of the purpose § 1988 is intended to serve:

> [T]he central issue standard places the focus of attention on the wrong issue. The goal of § 1988 was to make selflessness less expensive. The central issue test improperly focuses the court's attention on the selfish goals of the plaintiff. The central issue test requires an inquiry that is both difficult and irrelevant to the social function served by § 1988. The question that should be asked is whether a public right has been vindicated. If so, Congress requires an award of attorney's fees. The generous formulation of *Nadeau v. Helgemoe* properly focuses the attention of the factfinder on whether plaintiff has benefitted the public by serving as a private attorney general.

The Fifth Circuit's focus on whether the plaintiff achieved his "central" purpose not only misconceives the relevant issue, but requires the courts to engage in a complex and difficult inquiry, leading to unpredictable results and encouraging litigation rather than settlement of fee disputes.

For example, in this case, the courts below concluded that the litigation involved two issues, one concerning

the application of GISD's policy to outside representatives of employee organizations and the other concerning the application of the policy to GISD teachers; and the courts proceeded on the view that only one of those two issues could qualify as "the central issue." But it could as easily be said that there was only one issue in this case—namely, whether GISD could prohibit all communication concerning employee organizations during school time or using school facilities—and that petitioners prevailed on that issue.[18] Our point is not to argue which characterization is more apt, but to observe that the distinction between them turns largely on semantics, as well as on a speculative assessment of the parties' subjective aims. A civil rights plaintiff's entitlement to an award of attorney's fees should not turn on such nebulous considerations.

Precisely because of the nature of the inquiry mandated by the central issue test, application of that test "can be excruciating," Schwartz and Kirklin, *supra* at 348, and "[t]he application of the central-issue test guarantees increasingly protracted and complicated litigation over fees applications in an effort to distinguish centrality from significance." *Uviedo v. Steves Sash and Door Co.*, 760 F.2d 87, 89 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) (Rubin, J., dissenting from denial

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[18] Respondents themselves suggested such a unitary view of the issue when they complained that to invalidate the Regulation as applied to teachers "would be letting employee organizations accomplish through the back door what they cannot accomplish through the front door." See p. 5 *supra*. In the same vein, respondents declared that they should be allowed to limit speech concerning employee organizations whether the speech is "stated by a teacher representative . . . [or] by an outside employee organization representation [sic]," because "[t]he subject matter of employee organization business does not change character based on who is making the presentation." Brief Opposing Motion to Dismiss or Affirm at 5, *Garland Independent School District v. Texas State Teachers Ass'n*, 107 S. Ct. 41 (1986). Respondents characterized this as an aspect of "the school district's right to curtail employee

of rehearing *en banc*).[14] The litigation of that issue was complicated enough in this case, where the District Court attempted to divine the central issue by "look[ing] to the number of lines in the complaint and the amount of time spent at trial proving the various issues," 837 F.2d at 194 (App. 9a) (Goldberg, J., dissenting). It will be even more complicated in cases where the parties submit affidavits and other evidentiary materials in an effort to establish which issue was "the central [one]."[15] One thing is clear: in whatever manner the parties choose to proceed, the requirement of determining the "central issue" can only undermine compliance with this Court's admonition that "[a] request for attorney's fees should

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organization activities during school hours"—a right which respondents viewed as equally applicable to speech by outside representatives and speech by GISD teachers. *Id.* at 4.

[14] Judge Goldberg elaborated on this point in his dissent here, 837 F.2d at 196 (App. 14a-15a):

> The approach followed in [the Fifth] Circuit enhances the likelihood of protracted litigation over attorneys' fees. The central issue approach requires a judicial assessment of plaintiff's goals. Such an inquiry is problematic. During the course of the litigation goals inevitably shift. As here, an issue of only minor importance in the original complaint rose to sufficient significance to inspire an appeal all the way to the Supreme Court. The approach followed in this Circuit forces the trial court to evaluate the post hoc recharacterization of the lawsuit to determine the central issue ex ante. This inquiry is inherently artificial, complex and time consuming.

[15] The central-issue test invites such submissions because, as this case illustrates (pp. 16-17 *supra*), a party can never be sure that the court's parsing of the complaint and its assessment of the time devoted to various issues in the litigation will result in an accurate assessment of the importance and interrelationship of the various issues. What is more, although for simplicity we have referred to the Fifth Circuit's approach as a "central issue" test, "[a]pplication of the central issue standard is further complicated by its dual requirements that the prevailing plaintiff both succeed on the central issue in the litigation *and* obtain the *primary relief* sought." Schwartz and Kirklin, *supra* at 349-50 (emphasis added).

not result in a second major litigation." *Hensley*, 461 U.S. at 437.

In sum, as one treatise has put it:

> [T]he complexities and difficulties inherent in the central issue test are fundamentally at odds with the efforts at simplication of the analysis reflected in the Supreme Court's recent fee decisions. The uncertainties in the application of that standard invite the parties to litigate the prevailing party issue rather than settling the fee issue in accord with the clear preference of the Supreme Court. On all counts, there is little to command continued adherence to the central issue test for deciding the prevailing party question under § 1988.

Schwartz and Kirklin, *supra* at 351.

For these reasons, as well as the conflict in the circuits and the need to clarify the teaching of *Hensley* on this issue, this case plainly warrants review by this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-1221

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Feb. 8, 1988

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This proceeding challenges the district court's denial of a motion for an attorney's fees award in a case in which the appellants had partial success on a 42 U.S.C. § 1983 claim. We agree with the district court that the appellants were not "prevailing parties" and therefore are not eligible for an award of attorney's fees under 42 U.S.C. § 1988, and we affirm.

I. *Factual Background And Prior Proceedings*

The Texas State Teachers Association (TSTA), the Garland Education Association (GEA), and several individuals belonging to or employed by these organizations filed a 42 U.S.C. § 1983 suit in federal court on March 13, 1981, challenging a regulation of the Garland Independent School District (GISD). This regulation, GISD Administrative Regulation 412, was construed by GISD administrators and by this Court to prohibit visits to GISD campuses by outside representatives of teacher employee organizations[1] during regular school hours (8:00 a.m.—3:45 p.m., including lunch and nonteaching time), such representatives' use of a GISD school's internal communication systems, private conversations between two teachers regarding teacher employee organizations, and teacher use of a school's internal mail system and bulletin boards for this subject. *Texas State Teachers Assoc. v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985).

The challenge to Regulation 412 apparently arose when nine TSTA representatives visited several GISD schools during school hours in January 1981, and were refused permission by school administrators to distribute their literature or to meet with teachers or TSTA faculty representatives. In their suit, appellants claimed the regulation violated their free speech and free association rights under the First Amendment and violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. They also claimed the regulation was unconstitutionally overbroad. Appellants sought nominal, actual, and exemplary damages, injunctive relief, and declaratory relief under 42 U.S.C. § 1983.

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[1] "Employee Organization" is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures. TSTA and GEA are such organizations.

Both sides filed cross motions for summary judgment. The district court granted GISD's motion for summary judgment and denied appellants summary judgment motion with two exceptions not at issue before us.[2] The district court's opinion focused on the application of Regulation 412 in preventing outside representatives of employee organizations from recruiting, organizing, or meeting with GISD teachers on GISD campuses during school hours and in denying them access to GISD schools' internal mail systems, teacher mailboxes, bulletin boards, and public address systems. The district court held that this application of Regulation 412 did not violate appellants' constitutional rights to free speech, free association, or equal protection. The district court found no merit in appellants' due process challenge.

The court's discussion of Regulation 412's application to conversations among GISD teachers regarding employee organizations consisted of a single footnote. In that footnote the district court held that prohibiting teachers from discussing employee organization business among themselves during non-class time would be unconstitutional, but the court noted that there had not been any attempt to enforce such an interpretation of the regulation. The court held, however, that Regulation 412 could be used to prohibit teachers from promoting an employee organization or working for such an organization during the school day but during off-duty hours of teachers.

On appeal, this Court agreed with the district court that Regulation 412 was constitutional as it applied to

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[2] These two exceptions involved provisions in Regulation 412 which required the approval of a school principal before an employee organization could use school premises for meetings during *non-school* hours. The district court held that these provisions were unconstitutionally overbroad. The court noted that these two provisions were of minor significance and did not affect the constitutionality of the remainder of the regulation. This holding was not appealed.

outside representatives of employee organizations by preventing their access to GISD campuses and employees during school hours and preventing their use of school communication facilities. 777 F.2d at 1050-53. We held, however, that Regulation 412 was unconstitutional as it applied to prohibit "*any* discussions among teachers relating to TSTA or TSTA business or relating to any teacher organization that occur on school premises during school hours, even though those discussions occur during lunch hour or other non-class time." 777 F.2d at 1053. (emphasis in original). We disagreed with the district court's holding that this issue was not properly before the court. We held that conversations about employee organizations between GISD teachers during non-class times during the school day could not be prohibited since there was no showing "that such conversations result in a 'material and substantial interference with the activities or discipline of the school.'" 777 F.2d at 1055.

We also struck down the regulation's ban on the use of school internal mail facilities and bulletin boards by GISD teachers to transmit messages relating to employee organizations.

GISD filed a petition for rehearing before this Court, and a suggestion for rehearing en banc, contesting this Court's invalidation of Regulation 412 as it applied to teacher-teacher communication. These petitions were denied by the court. GISD filed a Motion for Stay of Enforcement and/or Recall of Mandate which we also denied. GISD appealed our decision to the Supreme Court and filed an Application For Stay of Enforcement pending appeal with the Supreme Court which that Court denied. The Supreme Court summarily affirmed our judgment, —— U.S. ——, 107 S.Ct. 41, 93 L.Ed.2d 4 (1986).

Appellants subsequently moved the district court for an award of attorney's fees pursuant to 42 U.S.C. § 1988.

The district court denied the request for attorney's fees, holding that although the appellants had achieved "partial success" in their suit against GISD, they did not prevail on the "central issue" which was GISD's policy limiting communications and access between employee organizations and GISD teachers. TSTA and the various appellants appeal this holding.

II. *Attorney's Fees Under 42 U.S.C. § 1988*

In pertinent part, 42 U.S.C. § 1988 reads: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonble attorney's fee as part of the costs." (emphasis added). The term "prevailing party" is not defined by the statute, but has been judicially defined by the courts. We have held that the test for "prevailing party" status as it applies to plaintiffs is "whether the plaintiff prevailed on the central issue by acquiring the primary relief sought." *Simien v. City of San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987). *See also Commonwealth Oil Refining Co., Inc. v. Equal Employment Opportunity Commission*, 720 F.2d 1383, 1385 (5th Cir.1983); *Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir.1981); *Iranian Students Association v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979).

Our definition of "prevailing party" is narrower than that of some of the other Federal appellate courts. "Prevailing parties" for § 1988 attorney's fees purposes has also been defined as parties who "'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), *quoting Nadeau v. Helgemoe*, 581 F.2d 275, 278-9 (1st Cir.1978). In *Hensley*, the Supreme Court merely accepted the "generous formulation" of the "prevailing party" definition found in some of the circuits

but did not hold it to be the only correct definition. *See* 461 U.S. at 433 n. 8, 103 S. Ct. at 1939 n. 8.

Clearly the "prevailing party" issue is a threshold inquiry to be made by a district court prior to the exercise of its discretion in deciding whether to award attorney's fees under § 1988. If plaintiffs are not the "prevailing parties" under § 1988, then they are not even eligible for an attorney's fees award.[3]

Applying this Court's definition of "prevailing party" to the facts of this case, we agree with the conclusion of the district court that appellants did not succeed on the central issue of their suit and did not obtain the primary relief sought. The main thrust of this lawsuit was appellants' attempt to open up GISD school campuses during school hours to outside representatives of employee organizations like TSTA and GEA and to allow such organizations the use of school communication facilities. Appellants failed in this attempt, and this was the primary relief sought in this lawsuit. Granted, appellants did succeed on significant secondary issues by having Regulation 412 declared unconstitutional as it applied to teacher to teacher conversation and teacher use of school communication systems. But this was not the primary relief sought. The central issue in this case was employee organization access to GISD campuses, not internal teacher communication within those campuses.

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[3] It should be noted that once a plaintiff is determined to be the "prevailing party" in an action subject to 42 U.S.C. § 1988, the plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. at 429, 103 S.Ct. at 1937; *Taylor v. Sterrett*, 640 F.2d at 668; *Iranian Students Association v. Edwards*, 604 F.2d at 353. In other words, the discretion of a district court in denying an award of attorney's fees to a prevailing plaintiff in a civil rights case is limited absent special circumstances. In the case at bar, however, the district court did not even exercise its discretion because the plaintiffs did not meet the threshold requirement of "prevailing party" status.

III. *Conclusion*

The district court was correct in holding that appellants were not eligible for an attorney's fees award under 42 U.S.C. § 1988 because they were not "prevailing parties" under § 1988.

AFFIRMED.

GOLDBERG, Circuit Judge, dissenting:

The Texas State Teachers Association ("TSTA") has won a hard fought battle for the first amendment rights of teachers in the Garland Independent School District ("GISD"). TSTA sought invalidation of GISD administrative regulation 412, which broadly prohibited union access to school premises, and barred teachers from "talking union" on school grounds. TSTA lost in the district court, but persuaded a panel of this Court to invalidate the regulation. TSTA successfully defended this judgment before the Supreme Court.

Today, the majority correctly applies the law of this Circuit to the facts of this case and concludes that, notwithstanding its apparent victory, TSTA is not the prevailing party for the purpose of a fee award under The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 ("§ 1988"). By adhering to the law of this Circuit, the majority persists in an approach to the prevailing party standard that has been rejected by all but one of the other circuits, flies in the face of Supreme Court precedent and is inconsistent with the legislative purpose in enacting § 1988. Taking my law from Congress as interpreted by the Supreme Court, I respectfully dissent.

I. The Central Issue Test Is Inconsistent With Supreme Court Precedent

Under the Civil Rights Attorney's Fees Act, a district court may, in its discretion, award attorney's fees to the

prevailing parties in lawsuits brought to enforce civil rights.[1] In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court discussed the standard for determining the amount and propriety of a fee award to a "partially prevailing plaintiff." *Id.* at 426, 103 S.Ct. at 1937. The Supreme Court quoted with approval the First Circuit's rule that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any significant issue* in the litigation which achieves *some of the benefit* the parties sought in bringing the suit." *Id.* at 433, 103 S.Ct. at 1939 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). While the Court does not mandate a specific "prevailing party" standard it does mandate a method. *Hensley* expressly declares that a plaintiff can be deemed the prevailing party even where only "minor" relief was obtained, *Id.* at 439, 103 S.Ct. at 1942 (citing *Brown v. Bathke*, 588 F.2d 634 (8th Cir.1978)), and requires the district court to look to the results obtained in determining the amount of an award. Under *Hensley* the degree of success goes to the amount of an award, not to the propriety of that award.

This Circuit has rejected the "generous formulation" of *Nadeau v. Helgemoe*, approved by the Supreme Court in *Hensley*, in favor of a crabbed standard which deems a party "prevailing" only if he or she "has been successful on *the central issue* . . . as exhibited by the fact that he has acquired *the primary relief sought.*" *Commonwealth Oil Refining Co. v. Equal Employment Opportunity Commission*, 720 F.2d 1383, 1385 (5th Cir.1983) (emphasis original) (quoting *Iranian Students Association v. Edwards*, 604 F.2d 352, 353 (5th Cir.1979)); *see also*

[1] 42 U.S.C. § 1988 provides: "[I]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of [title 42 of the United States Code], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Simien v. City of San Antonio, 809 F.2d 255, 258 (5th Cir.1987).[2] This Circuit's approach requires the district court to look back at the complaint, the proceedings and the trial, to divine plaintiff's primary goal. Judge Buchmeyer used these tools as well as they could be used. He looked to the number of lines in the complaint and the amount of time spent at trial proving the various issues. Applying the clearly erroneous standard to his factual findings, I cannot say that he reached the wrong conclusion.

I object, though, to the fact that these tools must be used at all. These factors provide some indication of the centrality of a given issue, but the fit is imperfect. Judges are not mind readers. Meritorious lawsuits are often brought for idiosyncratic reasons. Under our liberal system of notice pleading, a complaint may be filed before the legal strategy of the lawsuit is fully formed. Some allegations may be clear winners, some worthwhile longshots. At the outset any prediction as to their relative importance in the upcoming lawsuit may be well nigh impossible. At trial, different claims may have more complicated, and hence more time consuming proofs. A central issue may receive little attention in the complaint

[2] The Central Issue test had its genesis in the case of *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979). The case was decided prior to *Hensley*, awarded attorney's fees, and dealt with the issue of relief where the case ended before trial on the merits. As Judge Tate pointed out, dissenting in *Commonwealth Oil*, "the issue in this decision . . . was only whether a plaintiff, which had obtained relief after a temporary restraining order, could be regarded as a prevailing party in the absence of a showing of "probable success on the merits" (had the case been fully tried . . . . The court's actual holding was that "a plaintiff can be a 'prevailing party' even though the relief he has obtained is only preliminary or . . . is the result of a consent decree." 720 F.2d at 1388.

The language of this case has since been extended to the point where it now conflicts with Congressional purpose and Supreme Court precedent.

or at trial, simply because its importance is not matched by its complexity.

The Supreme Court has eschewed such an inquiry, stating that the method for dealing with partial success is to reduce the amount of the award, not to engage in extended inquiry into the plaintiff's subjective goal in bringing the lawsuit, stating:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the defendants—often an institution and its officers, as in this case,—counsel's work on one claim will be unrelated to his work on another claim. . . . The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits.

Hensley 461 U.S. at 434-35, 103 S.Ct. 1940.

In *Hensley*, the Supreme Court noted and did not disapprove the central issue test, *Id.* at 433 n.8, 103 S.Ct. 1939 n.8. At that point no decision applying the central issue test had rendered it facially inconsistent with the principles articulated in *Hensley*. Indeed, with one exception, cases decided at the circuit level since *Hensley* would most likely have been decided the same way under the "generous formulation." *See Commonwealth Oil Refining Co. Inc. v. E.E.O.C.*, 720 F.2d 1383, 1386 (5th Cir.1983) (Tate, J., dissenting); *Simien v. City of San Antonio*, 809 F.2d 255 (5th Cir.1987). *But see Uviedo v. Steves Sash & Door Co.*, 760 F.2d 87, 88 (5th Cir.1985) (Rubin, J., dissenting from denial of a Suggestion for Rehearing En Banc).

This case, however, clearly demonstrates the point at which the central issue test and the generous formulation diverge. Plaintiffs have received significant relief, but they failed to win the primary relief sought. *Hensley*

made it clear that the method for dealing with such partial success was to withhold payment for unsuccessful claims, not to withhold fees altogether. Here plaintiffs vindicated important first amendment rights. Section 1988 mandates compensation for getting what they got, regardless of whether they got what they wanted.

II. There is a Clear Split in Circuits Which Must be Resolved by the Supreme Court.

In any other circuit, save the Eleventh, *see, e.g., Miami Herald Publishing Co. v. City of Hallendale*, 742 F.2d 590, 591 (11th Cir.1984), plaintiffs would receive an award of attorneys' fees as a matter of course. Eleven Circuits have followed the First Circuit's "generous formulation"; *Miller v. Staats*, 706 F.2d 336, 340-41 (D.C. Cir.1983); *Gingras v. Lloyd*, 740 F.2d 210, 212 (2nd Cir.1984); *Abraham v. Pakarski*, 728 F.2d 167, 175 (3d Cir.), *cert. denied*, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Lotz Realty Co., Inc. v. U.S. Dept. of Housing*, 717 F.2d 929, 931 (4th Cir.1983); *Kentucky Association for Retarded Citizens Inc. v. Conn*, 718 F.2d 182 (6th Cir.1983); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1276-77 (7th Cir.1983); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir.1983); *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir.1984). This Circuit and the Eleventh (following old Fifth Circuit precedent) have persisted in their use of the central issue approach.

Indeed, there is even a split within this Circuit. *Posada v. Lamb County, Tex.*, 716 F.2d 1066, 1071 n. 6 (5th Cir. 1983) (endorsing the "generous formulation" of *Nadeau v. Helgemoe*). This Circuit when faced with this inconsistency in its own law, the non-conformity of that law with Supreme Court precedent and the rejection of the central issue approach by every circuit faced with the

question since *Hensley*, has steadfastly refused to review the question en banc. *Uviedo v. Steves Sash & Door Co.*, 760 F.2d 87, 88 (5th Cir. 1985) (Rubin J., dissenting from denial of a Suggestion for Rehearing En Banc). If this federal statute is to be uniformly applied, the Supreme Court must grant certiorari in order to resolve this split in circuits.

III. The Central Issue Approach is Inconsistent with The Legislative History of Section 1988

A. The Purpose of § 1988

In enacting § 1988 Congress sought to increase the number of suits brought to vindicate public rights, by eliminating the financial uncertainty associated with such suits, saying:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S.Rep. No. 1011, 94th Cong., 2d Sess. x, *reprinted in* 1976 U.S.Code. Cong. Adm. News 5908, 5910. Against this clear mandate, the central issue test sets a high threshold for recovery, thereby leaving any attorney who vindicates important public rights but achieves only partial success uncertain as to whether he or she will recover fees.

The legislative history does not speak directly to the degree of certainty required but there is strong evidence that Congress intended fees to be awardable even when plaintiff did not succeed on the central issue of the litigation. The Senate Report on § 1988 expressly approved

awards of attorneys' fees pendente lite, and in the process suggested a lower "prevailing party" threshold than required in this Circuit:

> In appropriate circumstances, counsel fees under [§ 1988] may be awarded *pendente lite*. See *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Such awards are especially appropriate where a party has prevailed on an *important* matter in the course of litigation, *even when he ultimately does not prevail on all issues.*

S.Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. Adm. News 5908, 5912 (emphasis added). *Hanrahan v. Hampton*, 446 U.S. 750, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980). Thus the suggested standard for interim attorney's fees is simply success on an "important matter." Paradoxically, the law of this Circuit requires a litigant who succeeds at trial to achieve a greater degree of success than the interim fee applicant envisioned by Congress. After trial, a litigant must succeed on the central issue.

This inconsistency becomes more important when one recognizes that many suits brought under § 1983, for example, are not simple bipartite suits which end with a jury verdict or order. Many cases are ongoing institutional cases, brought to desegregate schools, *see, e.g., United States v. Board of Education of City of Chicago*, 744 F.2d 1300 (7th Cir.1984), to reform prisons, *see, e.g., Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.1982), or mental institutions, *see, e.g., Lelsz v. Kavanagh*, 629 F. Supp. 1487 (1986). These cases often consist of trials, consent decrees, injunctions, damage judgments and hearings, all carried out over the course of many years. These crucial cases consist of many small victories and many small defeats. No individual attorney could bear the cost of prosecuting such a suit without the avail-

ability of interim fees after a victory in one of the case's many skirmishes.

The central issue approach is inconsistent with the availability of such interim fees. In a school desegregation case, even the attorneys may disagree over what the primary goal of the litigation is, let alone whether it has been achieved. Indeed, the original attorneys may long ago have left the case. Yet few would argue that attorneys' fees should be denied to public spirited attorneys who have aided in dismantling segregated schools. The same is true of prison and institutional reform litigation, where supervision of implementation of a consent decree may take years, and high hopes often give way to modified expectations. Schools have been partially desegreated, prisons partially reformed. A plaintiff need not single handedly part the Red Sea to be considered a prevailing party for the purposes of § 1988. Congress was no doubt cognizant of the proverb, "better is half a loaf than no bread." John Heywood, *Proverbs* 1546.

The qualified interim successes in cases of such great importance were within the contemplation of Congress when they approved interim fees. Strict adherence to the central issue test undercuts this clearly stated congressional goal.

IV. Conclusion

The approach chosen by the Supreme Court is salutary for reasons both of judicial economy and for reasons of coherence. The Court has admonished, "A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941. The approach followed in this Circuit enhances the likelihood of protracted litigation over attorneys' fees. The central issue approach requires a judicial assessment of plaintiff's goals. Such an inquiry is problematic. During the course of the litigation goals inevitably shift. As here, an issue of only minor importance in the original complaint rose to sufficient significance to inspire an appeal

all the way to the Supreme Court. The approach followed in this Circuit forces the trial court to evaluate the post hoc recharacterization of the lawsuit to determine the central issue ex ante. This inquiry is inherently artificial, complex and time consuming.

In addition to encouraging secondary litigation over fees, the "central issue" approach is inconsistent with the efficiency goals which motivate liberal rules of joinder. Allowing fees only if there is success on the central issue might encourage segmentation of claims into separate lawsuits in order to increase the likelihood of fees on the meritorious claims.

Finally, the central issue standard places the focus of attention on the wrong issue. The goal of § 1988 was to make selflessness less expensive. The central issue test improperly focuses the court's attention on the selfish goals of the plaintiff. The central issue test requires an inquiry that is both difficult and irrelevant to the social function served by § 1988. The question that should be asked is whether a public right has been vindicated. If so Congress requires an award of attorney's fees. The generous formulation of *Nadeau v. Helgemoe* properly focuses the attention of the factfinder on whether plaintiff has benefited the public by serving as a private attorney general.

Thus, the central issue standard is inconsistent with Supreme Court precedent, with the legislative history, and with sound judicial policy. It has been rejected by all but one other Circuit. I profoundly hope that the Supreme Court will grant certiorari in this case, resolve this split in circuits in favor of the general formulation endorsed in *Hensley*. For these reasons I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Plaintiff,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT,
Defendant.

[Filed Mar. 3, 1987]

MEMORANDUM OPINION AND ORDER

After an appeal from this Court's order dated August 24, 1984 (*see Texas State Teacher Association v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985)), plaintiffs have returned to this Court seeking attorneys' fees under 42 U.S.C. § 1988. Plaintiffs are the Texas State Teachers Association ("TSTA"); Garland Education Association ("GEA"); Joe Atkins, a TSTA member; and Janice Hill, a member of GEA. Defendants are the Garland Independent School District ("GISD"); its Board of Trustees; Harris Hill, Synda Gordon, Mike Cloud, Don Hollenshead, Mike Boyd, Randy Clark and M.D. Williams, IV in their official capacities as trustees; and Jill Shugart in her official capacity as Superintendent of GISD.

The statute permits a court to award attorneys' fees to the "prevailing" party in a civil rights suit. *Id.* "In this circuit the test for prevailing party status is whether the plaintiff prevailed on *the central issue* by acquiring the primary relief sought." *Simien v. City of San Antonio*, No. 85-2723, slip op. at 2184 (5th Cir. Feb. 6, 1987) (emphasis added) (citing *Commonwealth Oil Refining Company v. EEOC*, 720 F.2d 1383, 1385 (5th Cir. 1983)). Thus, a party who achieves success on fewer than all of the issues cannot recover attorneys' fees unless the issues on which he did succeed amounted to the central issue of the lawsuit. *Commonwealth Oil*, 720 F.2d at 1385 & n.2. To apply this circuit's test, the court "must compare the allegations made with the results obtained and pick out a winner." *Commonwealth Oil*, 720 F.2d at 1385.

Although the events leading up to the filing of this lawsuit are set forth in this Court's 1984 order as well as in the Fifth Circuit's opinion, 777 F.2d at 1048-49, they are restated here for their relevance to the determination of prevailing party status:

On January 8 and 9, 1981, representatives of TSTA visited several GISD schools during school hours. In most of the schools the representatives attempted to visit, the principal or assistant principal relied on GISD Administrative Regulation 412 [1] to prevent them from distribut-

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[1] Administrative Regulation 412 provides:

> Relationship with employee organizations will be consistent with Article 21-904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
>
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.

[Continued]

ing literature or meeting with GISD teachers. This lawsuit followed. Plaintiffs claimed that GISD policy as expressed in Administrative Regulation 412 violated their rights under the first and fourteenth amendments—rights of free speech, free association, equal protection, and due process—and were unconstitutionally overbroad. In addition to declaratory and injunctive relief, Plaintiffs sought nominal, actual and exemplary damages as well as attorneys' fees.

Defendants denied Plaintiffs' allegations and both parties moved for summary judgment. This court denied Plaintiffs' motion "with one minor exception"[2] (Memo-

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[1] [Continued]

3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.

4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

5. Group meetings or individual conferences conducted by an elected official of any employee organization for purposes of membership recruitment or any other matter of business, shall not be conducted on school premises during school hours. School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

6. The school mail service shall not be used by any employee organization.

7. Distribution of material directly in mailboxes at the school is prohibited.

8. The use of school district equipment and supplies by any employee organization is prohibited.

9. The public address system is for school business only. Association announcements shall not be made on school equipment.

[2] No appeal was taken from this part of the Court's Order. 777 F.2d at 1050.

randum Opinion and Order of August 24, 1987, at 3; *see id.*, at 18-19), and granted Defendants' motion in all other respects, including the question of attorneys' fees (*Id.*, at 21 & n.26). Plaintiffs appealed.

On appeal, the Fifth Circuit affirmed the decision of this Court on all matters respecting "communications instigated by outside representatives of TSTA who desire access to school communications facilities." 777 F.2d at 1050. They did, however, agree with the Plaintiffs and reversed this Court's decision respecting communications *among GISD teachers only* holding "that GISD policies which purport to deny teachers the right to discuss TSTA or TSTA business during non-class time are unconstitutional." *Id.* at 1055. The Fifth Circuit also held "that GISD policies preventing teachers from using school mail facilities to mention 'employee organizations' are unconstitutional." *Id.*

Because the Fifth Circuit did not address this Court's denial of attorneys' fees, this Court is free to reconsider the matter here. *Barrett v. Thomas*, No. 86-1172, slip op., at 2282 (5th Cir. Feb. 12, 1987).

As a result of the Fifth Circuit's decision, Plaintiffs achieved only partial success. They did not prevail on claims relating to the TSTA's use of school communications facilities—school mail service, bulletin boards, public address system or other school equipment. They did not succeed in achieving access by TSTA to teachers during school hours, nor did they succeed on claims relating to other forms of distributing literature to teachers during school hours.

It is clear, not only from the background of the lawsuit, but also from the claims as presented by Plaintiffs, that their challenge to GISD's policy limiting communications and access between TSTA and GISD teachers comprised the gravamen of Plaintiffs' lawsuit. This challenge amounted to the central issue. The Plaintiffs did

not prevail on this issue and did not achieve the results they sought. Accordingly, they cannot recover attorneys fees in this circuit under 42 U.S.C. § 1988. *See Simien*, slip op., at 2184; *Commonwealth Oil*, 720 F.2d at 1385.

For the foregoing reasons, it is the ORDER of this Court that Plaintiffs' motion for attorneys' fees be DENIED.

SIGNED this 3rd day of March, 1987.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-1833

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS AND JANICE HILL,
Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Dec. 6, 1985

Appeal from the United States District Court
for the Northern District of Texas

Robert H. Chanin, Jeremiah A. Collins, Washington, D.C., for plaintiffs-appellants.

Law Offices of Earl Luna, Earl Luna, Robert E. Luna, Dallas, Tex., for defendants-appellees.

Before GARZA, JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal involves a claim brought by a teacher organization against a school district under 42 U.S.C. § 1983 (1981). Appellants contend that policies of appellees deny them access to school grounds and school media facilities and restrain free speech in violation of their First and Fourteenth Amendment rights. Appellants are the Texas State Teachers Association (TSTA); the Gar-

land Education Association (GEA), a TSTA local affiliate; Joe Atkins, a TSTA employee; and Janice Hill, a GEA member employed as a teacher in the Garland Independent School District (GISD). Appellees are GISD; Harris Hill, Donald Center, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M.D. Williams, IV, in their official capacities as GISD Trustees; and Eli Douglas in his official capacity as GISD Superintendent. The district court determined that appellants had no constitutionally protected right of free speech access to GISD schools, and granted summary judgment in favor of appellees. TSTA appeals from the grant of summary judgment against them, and from the denial of their motion for partial summary judgment.

FACTS

TSTA is a voluntary employee organization. It sought to distribute TSTA information to teachers in GISD schools during school hours. TSTA also wanted to use school communication facilities—including school mail-boxes, billboards, and the public address system—as mediums for the distribution of their information.

GISD policy, as expressed in Administrative Regulation 412,[1] totally prohibits any "employee organiza-

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[1] Administrative Regulation 412 prohibits representatives of employee organizations from recruiting, organizing, or meeting with GISD teachers on school grounds during school hours. In addition, it denies employee organizations any access to the school's internal mail system, teacher mailboxes, bulletin boards, and public address system. It provides, in pertinent part:

> Relationships with employee organizations will be consistent with article 21-904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.

[Continued]

tion"[2] from meeting or recruiting during "school hours",[3] and from using school communication facilities for the dis-

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[1] [Continued]

> 3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.
> 4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
> 5. Group meetings or individual conferences conducted by an elected official of any employee organization for purposes of membership recruitment or any other matter of business, *shall not be conducted on school premises during school hours*. School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
> 6. The school mail service shall not be used by any employee organization.
> 7. Distribution of material directly in mail-boxes at the school is prohibited.
> 8. The use of school district equipment and supplies by any employee organization is prohibited.
> 9. The public address system is for school business only. Association announcements shall not be made on school equipment.

School officials interpret the phrase "elected official" in Admin.Reg. 412(5) as including any employee representative, whether or not an elected representative, so long as that employee is "promoting" the organization. School officials interpret Admin.Reg. 412(8) as prohibiting the use of school billboards by employee organizations.

[2] "Employee Organization" is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures. The parties stipulated that both TSTA and GEA are employee organizations within the meaning of the GISD policies.

[3] The term "school hours" means "the entire period between 8:00 a.m. and 3:45 p.m. of each school day except for days when school may be let out early."

semination of information concerning employee organizations. GISD policy allows employee organizations to meet or recruit teachers on school premises before 8:00 a.m. or after 3:45 p.m. "upon request to and approval by the local principal." GISD policy also allows the distribution of literature on school premises (parking lots, hallways, and placement on teachers' desk) during non-school hours.

On January 8 and 9, 1981, TSTA representatives visited numerous GISD schools during school hours. Relying on GISD Administrative Regulation 412, the principal or assistant principal of most schools refused to permit the TSTA representatives to distribute literature or to meet with GISD teachers.

This lawsuit resulted. Appellants claimed that these GISD policies violated their First and Fourteenth Amendment rights of free speech, free association, and equal protection of the laws, and were unconstitutionally vague and overbroad. Appellants argued that these policies, as interpreted and implemented by school officials, operated to deny GISD teachers their right to discuss TSTA business even during non-class times such as the lunch hour (several GISD teachers and administrators are members of TSTA). Appellants further contended that school officials routinely granted access to school communication facilities to other commercial and civic organizations (upon approval of the principal), and that "employee organizations" were discriminatorily denied access.

Appellees denied that their policies violated the appellants' First and Fourteenth Amendment rights. They argued that the GISD schools are not a public forum, and therefore appellants have no right to access. Appellees urged that reasonable alternative means of communication were available to TSTA—*i.e.*, meeting after school hours, distributing literature on school property

after school hours, or contacting teachers at school or home through the United States Postal Service. Finally, appellees contended that allowing employee organizations to use school facilities would disrupt the learning process and would be contrary to Texas Education Code § 21.904 —which requires a school district to maintain a position of neutrality with respect to employee membership in various organizations.[4]

The parties each filed a motion for summary judgment. The district court granted appellants' motion for partial summary judgment as to Admin.Reg. 412(4) and (5)—which permits employee organizations to use school premises for meetings during non-school hours only "upon request to and approval by the local school principal." The district court held that this rule was unconstitutionally overbroad.[5] This holding is not appealed. As to the remainder of appellants' claims, the district court granted appellees' motion for summary judgment and denied appellants' motion. We reverse in part and affirm in part.

THE RIGHT TO COMMUNICATE

In granting the GISD motion for summary judgment, the district court relied upon *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Under *Perry*, the "existence of a right of access to public property and the standard by which limitations upon such a right must

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[4] Section 21.904 provides, in pertinent part: "No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefitting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association. . . ." TEX.EDUC.CODE § 21.904 (Vernon 1972).

[5] Because appellants did not show any refusal of access during non-school hours, no relief was given with respect to this holding.

be evaluated differ depending upon the character of the property at issue." *Perry*, 460 U.S. at 44, 103 S.Ct. at 954, 74 L.Ed.2d at 804.

Perry describes the three types of forums that exist in public property for First Amendment purposes at 460 U.S. 45, 103 S.Ct. 954-55, 74 L.Ed.2d 804: (1) *Public Forums*: These are areas "which by long tradition or by government fiat have been devoted to assembly and debate." Examples are public streets and parks. Speech may not be suppressed for content in these forums unless the state shows a "compelling state interest" and a regulation "narrowly drawn to achieve that end." Public forums are also subject to reasonable "time, place, and manner" restrictions. (2) *Limited Public Forums*: These are forums which the state has voluntarily "opened for use by the public as a place for expressive activity." As long as the forum remains open, speech is protected to the same extent as in a public forum. In a limited public forum, only "similar entities" to those allowed access have a protected right of speech. (3) *Non-Public Forums*: This is "property which is not by tradition or designation a forum for public communication." In a non-public forum, "the state may reserve the forum for its intended purposes . . . so long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

GISD policy, as expressed in Administrative Regulation 412, affects two different classes of communications: (1) communications instigated by outside representatives of TSTA who desire access to teachers and school communication facilities; and (2) communications among GISD teachers employed by the schools. A different analysis is relevant to each separate type of communication. Because appellants are appealing a summary judgment, we must look at the evidence in the light most favorable to them. *Simon v. United States*, 711 F.2d 740, 743 (5th Cir.1983).

A. *Communications of Outside TSTA Representatives*

1. *During school hours*

Schools are not considered traditional public forums in which outside visitors may freely espouse their views. *See Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440, 446 n. 5 (1981); *Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806. Moreover, school administrators must be given broad discretion in supervising the visitation of the school environment by persons not associated with the school. *Hall v. Board of School Commissioners of Mobile County, Alabama*, 681 F.2d 965 (5th Cir.1982). Because GISD schools are not public forums, outside TSTA representatives have no constitutional right of access. *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 263 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 248, 83 L.Ed.2d 186 (1984). Appellants argue, however, that the school has allowed other visitors from civic and commercial groups to meet with teachers during school hours, and has therefore voluntarily created either a public forum or a limited public forum.

GISD permits selected groups of educators, textbook salesmen, and representatives of civic and charitable organizations to meet with students and faculty during non-class school hours. These meetings must concern school-sponsored or related activities and must not interfere with class time. Those persons seeking access must obtain prior permission from the school principal, and in some cases, from the Superintendent's office. The district court found that:

> In each case, the policies carefully limit the access of selected visitors by requiring them to report to the principal's office before visiting other parts of the campus, by prohibiting visitors from roaming

around the campus unescorted, and by directing the school principals to take every precaution necessary to ensure that the visitors do not interrupt classes.

This selective visitation policy does not create a public forum in GISD schools. *Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806.

In addition, outside TSTA representatives are not due any right of visitation through the doctrine of "limited public forum." Even though the school district has granted access during school hours to representatives of certain civic and commercial groups, "the constitutional right of access would in any event extend only to other entities of similar character." *Id.* Under *Perry*, the visitors allowed access—educators, salesmen, and the like, discussing school-related activities—are not "similar entities" to an employee organization, such as TSTA, concerned with teacher employment practices and procedures.

In *Perry*, a teacher organization (PLEA) sought access to school mail facilities. A rival union (PEA), and civic groups such as the girl scouts, boys' club, and the YMCA were granted access. Nevertheless, the *Perry* court held that even if a limited public forum had been created by the school, PLEA had no constitutional right of access because it was not a similar entity to the groups already allowed access. PLEA was not similar to the civic groups because, unlike those groups, it was an organization concerned with "terms and conditions of teacher employment." 460 U.S. at 48, 103 S.Ct. at 956, 74 L.Ed.2d at 806. The same is true of TSTA's relationship to the civic groups granted access by GISD. PLEA was not similar to PEA because PEA was the exclusive bargaining representative, while PLEA was not. *Id.* In the present case, GISD does not grant access to *any* "employee organizations." Therefore, TSTA's claim that they are a "similar entity" to the civic groups

allowed access by GISD fails under the *Perry* holding.[6] We hold that GISD policies are constitutional as applied to the visitation of the school by outside TSTA representatives during school hours.

Appellants also contend that policies of GISD constitute impermissible content discrimination in violation of the equal protection clause of the Fourteenth Amendment. Since outside representatives of TSTA have no First Amendment right of access to the school, the grant of access to other organizations does not burden a fundamental right of TSTA. *Perry*, 460 U.S. at 52, 103 S.Ct. at 959, 74 L.Ed.2d at 809. Therefore, the school district's policy need only rationally further a legitimate state purpose. *Id.* We find one of the justifications advanced by GISD—that of limiting contacts during the school day so that teachers may concentrate on teaching—survives the test of rationality. Therefore, we find no merit in appellant's equal protection claim as it relates to outside representatives of TSTA.

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[6] TSTA attempts to distinguish *Perry*. TSTA argues that the groups allowed access in *Perry* were not similar entities to PLEA because the groups granted access were "organizations that engage in activities and educational relevance to students," while PLEA was a group that was concerned with *teacher* issues. *See Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806. Thus, TSTA contends that the school district in *Perry* had opened its doors to groups discussing student issues, but not groups discussing teacher issues. TSTA argues that the present case is distinguishable from *Perry* because GISD allows access to groups concerned with solely "teacher" issues—for example, YMCA teacher swimming and bowling teams.

The facts in *Perry* do not support TSTA's distinction. The school district in *Perry* did allow access to groups concerned with solely "teacher" issues. For example, PEA, the teacher union which had bargaining representative status, was allowed access. Also, there is no indication that the communications of the *Perry* YMCA were substantially different from the communications of the GISD YMCA. Nevertheless, *Perry* held that PLEA was not a similar entity to the groups allowed access.

2. *Use of school mail facilities*

Unless it has been opened to the general public, a school mail system is not a public forum. *Perry*, 460 U.S. at 47, 103 S.Ct. at 955-56, 74 L.Ed.2d at 806. The same is true of school billboards and the public address system so long as there are alternative channels of communications. *See Connecticut State Federation of Teachers v. Bd. of Educ. Members*, 538 F.2d 471, 480-81 (2nd Cir.1976).

Appellants argue that GISD allows other commercial and civic organizations to use school communication facilities. They then contend that either a public forum or a limited public forum has been created in GISD communication facilities, to which the appellants should be granted access. Appellants assert that "employee organizations" are the only groups denied access to GISD facilities.

The evidence indicates that GISD has not created a public forum in its communication facilities. On occasion, school principals have allowed certain civic and commercial groups to distribute literature through school facilities. For example, GISD sometimes allows access to organizations such as the PTA, Little League, Boy Scouts, Junior Achievement, teacher bowling and swimming groups, and Board-approved insurance companies. Similarly, in *Perry*, certain community and civic groups—*i.e.*, the Cub scouts, YMCA, local church groups, etc.—were granted access to school mailboxes. Nevertheless, *Perry* held that "[t]his type of selective access does not transform government property into a public forum." 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806.

Likewise, TSTA has no right of access under a claim of "limited public forum." No "similar entities" to TSTA —*i.e.*, other employee organizations—are granted access to GISD facilities.[7] It is permissible to refuse to "grant

[7] *See supra* note 6 and accompanying text (TSTA not "similar entity" to groups allowed access).

employee organizations the right to use the school mails at all." *Ysleta Fed. of Teachers v. Ysleta Ind. Sch. Dist.*, 720 F.2d 1429, 1433 (5th Cir.1983). In short, GISD has not created a public forum and also has not created a "limited public forum" for entities similar to employee organizations. Therefore, we hold that GISD may prevent outside representatives of "employee organizations" from using school communication facilities.

It is important to note, however, that GISD's argument that Admin.Reg. 412 is necessary in order to comply with Texas Education Code § 21.904—which forbids school districts from "coerc[ing]" teachers to join any "group, club, committee, organization, or association"—is without merit. Appellees contend that allowing the mention of TSTA or other employee organizations on campus during school hours will somehow be seen as "coercion" by the school district to join those organizations. However, a policy which allows all employee organizations access under the same guidelines does not constitute "coercion." *See Widmar*, 454 U.S. at 273-76, 102 S.Ct. at 276-78, 70 L.Ed.2d at 449-51 (mere grant of access to religious organization does not "confer any imprimatur of state approval"); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 165 (4th Cir.1976) (No university approval of organization implied from university's recognition of organization).[8]

B. *Communications of GISD Teachers.*

1. *Private Communications*

Regulations on the speech of those who teach within the schools obviously must be drawn more narrowly than regulations on the speech of outside representatives. *See Country Hills Christian Church v. United School District*

[8] Curiously, GISD permits communications concerning other teacher groups, such as bowling teams, without any apparent concern that it is thereby coercing teachers to join such groups.

512, 560 F.Supp. 1207, 1214-15 (D.Kan.1983) (cited with approval by this Court in *Ysleta*, 720 F.2d at 1435); *Hall*, 681 F.2d at 968 (distinction exists between teacher communications and the rights of "persons not assigned to the schools"). *Perry*, which concerns the rights of organizations outside the schools, does not apply to teacher communication within the school. *See Country Hills*, 560 F.Supp. at 1215, 1220; *see also Hastings v. Bonner*, 578 F.2d 136, 143 (5th Cir.1978) ("[T]here is no doubt that this circuit has adopted and now applies the *Tinker* test in cases involving the First Amendment rights of teachers."). The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d. 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school." *Id.; see also Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir.1972).

The evidence indicates that school officials interpret Admin.Reg. 412 as prohibiting *any* discussions among teachers relating to TSTA or TSTA business or relating to any teacher organization that occur on school premises during school hours, even though those discussions occur during lunch hour or other non-class time.[9] Although

[9] Assistant Superintendent Beavers testified as follows:

Q: Can you tell me whether the district has a policy or practice which prohibits teachers from discussing teacher employee organization matters between the hours of 8:00 and 3:45 on school days?

A: Yes, we do.

Q: Does it matter what the content of the conversation is or where on campus it occurs?

A: No it doesn't.

Q: Are two teachers—does it matter whether they are members or nonmembers of an organization?

A: No.

[Continued]

acknowledging that such an interpretation is unconstitutional, the district court disregarded this issue because it

[9] [Continued]

Q: If two teachers then are walking down the hall going to lunch and they start chatting about an upcoming TSTA seminar in Austin, is this a violation of that policy?

A: Technically it would be.

. . . .

Q: If two teachers are sitting having lunch and they start talking about a TSTA membership drive and nobody else is within ear shot and both of them are voluntarily partaking of the conversation, is that a violation of your district's policies?

A: Technically it would be a violation.

Principal Hardy testified as follows:

Q: If I were a member of TSTA and I were a member of your faculty, would there ever be a circumstance under which I could discuss TSTA business with other faculty members during school hours?

A: Not during the school hours.

. . . .

Q. [I]n general if one wanted to [discuss TSTA business during school hours], he or she could not, could she?

A: She probably could illegally. She couldn't—

Q: If she did so, she would be violating the rules, wouldn't she?

A: Yes.

Q: What rules are we talking about? Are we still talking about Administration Regulation and Policy—

A: 412.

Principal White testified as follows:

Q: Do you have a policy as to whether two or more teachers can confer regarding teacher organization matters during school hours?

A: Yes.

Q: What is the policy?

A: 412.

Q: They can't do it?

A: No.

Q: Does it matter whether they are members of an organization?

A: No.

Superintendent Douglas testified as follows:

found that "there has never been any attempt to enforce such an interpretation." After reviewing the evidence in the light most favorable to appellants, we must disagree.

First, it is undisputed that school officials *would* prohibit GISD teachers from discussing TSTA if, in their view, such discussion amounted to "promoting" the organization. The district court found (and appellees argue on appeal) that punishment of speech "promoting" employee organizations is justified under an opinion of the Texas Attorney General. Texas Atty.Gen.Op. M.W. 89 held that it was a violation of the Texas Constitution to allow teachers to perform employee organization business on a "release time" basis.[10] The Attorney General found that such a program was unconstitutional because it "constitutes an unconditional grant of public funds to a private organization." Appellees urge that private teacher discussions during non-class time are comparable to the "release time" program.

The "release time" program is not at all comparable to private teacher conversations even though those conversations may be proselytizing. The "release time" program provided that teachers who would otherwise be teaching would be allowed to be absent from their teaching duties for a specified number of days to work for an employee organization at the school district's expense. Here, in

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Q: Can four non-elected members of TSTA who happen to be teachers and who happen to be taking a 10-minute coffee break in your teachers' lounge or work room—can they legitimately discuss next month's TSTA seminar in Austin?

A: We ask our staff members from [sic] refrain from discussing professional organizations and associations during the course of the school day.

Q: From 8:00 to 3:45?

A: 8:00 to 3:45.

Q: So it would be technical violation?

A: Yes.

[10] The "release time" program provided that "nine days of release time with full pay will be allotted to professional organizations for each 100 members who are in good standing."

contrast, the issue is the right of teachers to discuss matters relating to employee organizations at times when the teachers would not otherwise be required to teach, but would be "free to talk about whatever they want," including "the Cowboy game . . . [or] what they did over the weekend."[11] To allow teachers to speak favorably of an employee organization does not constitute an unlawful "grant of public funds to [the] organization," any more than to allow teachers to speak favorably of a political party, a church, a club, or a football team during the lunch hour constitutes an unlawful grant of public funds to such an organization.[12]

Second, there is firm evidence indicating that officials might be inclined to enforce their policies against *all* teacher speech mentioning TSTA that occurs on school premises during the school day whether the teacher is in the classroom or not.[13] Appellees' evidence in response demonstrates only that there is no active monitoring of teacher conversation.[14] This evidence does not establish

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[11] Testimony of Assistant Superintendent Beavers and Principal White.

[12] The "release time" program is not at issue in this case and we express no opinion regarding the Texas Attorney General's Opinion.

[13] *See* testimony, *supra* note 9.

[14] The district court referred to the following testimony in concluding that "there has never been any attempt to enforce such an interpretation" of Admin.Reg. 412(5):

Q: Now on just general freedom on [sic] speech on talking about whatever they want to talk about, there is no attempt to monitor or keep the teachers from talking about whatever they want to talk about, is there?

A: (Principal White) None whatsoever.

. . . . . .

Q: But you don't have any way of monitoring it to eavesdrop on people to be sure that they didn't talk about the party they went to last night?

[Continued]

that officials would refrain from enforcing violations of which they became aware. For example, there is no indication that officials would not take at least some sort of disciplinary action against a teacher whose violation of Admin.Reg. 412 was reported to officials by another teacher.

Finally, the mere fact that this policy exists is sufficient to support appellants' cause of action. Even if no officials attempt to overhear teacher conversations, conscientious teachers should be expected to obey school regulations.[15] The regulation inhibits the speech of law abiding teachers. Thus, even without actual monitoring of conversations, the rule chills teacher speech in violation of their First Amendment rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Spartacus, etc. v. Board of Trustees of Illinois*, 502 F.Supp. 789, 796-97 (N.D.Ill.1980) ("Injury to First Amendment rights may result from the threat of enforcement itself, since it may chill . . . ardor and desire to engage in protected expression.").

We hold that GISD policies which purport to deny teachers the right to discuss TSTA or TSTA business during non-class time are unconstitutional. Appellees have not demonstrated that such conversations result in a "ma-

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[14] [Continued]

A: (Assistant Superintendent Beavers) No, sir, we don't do that.

Q: But being responsible people you would expect them [the teachers] to keep their conversation generally along the lines of the school business?

A: Yes sir.

[15] Although acknowledging that officials do not eavesdrop on conversations, Assistant Superintendent Beavers testified as follows:

Q: Teachers are professional people?
A: Yes.
Q: And you expect them generally to follow the regulations?
A: Yes, we do.

terial and substantial interference with the activities or discipline of the school."

2. *Use of school media facilities*

The primary purpose of GISD's internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. GISD allows teachers to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations.[16]

Appellees argue that prohibiting teacher communications as they relate to "employee organizations" is proper because it preserves the neutrality mandated by the Texas Education Code. As noted above, we find no merit to that contention.[17] Teachers who have access to school media facilities for even purely personal matters cannot be prohibited from the exercise of that right simply because their internal speech may concern "employee organizations." We therefore hold that GISD policies preventing teachers from using school mail facilities to mention "employee organizations" are unconstitutional. So also are prohibitions against the use of whatever billboard facilities may be set aside for teachers' personal messages. No "material and substantial" disruption has been shown.

CONCLUSION

We affirm that part of the summary judgment which upholds Administrative Regulation 412's prohibition against visitation and use of school media by outside

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[16] Neither appellees nor appellants distinguish access to use the public address system from the access granted to use the mail system or the school billboards. Obviously, schools do not generally allow teachers to broadcast personal messages over their loudspeakers. The use of the public address system has not been placed at issue in this case.

[17] *See* text accompanying note 8, *supra*.

employee organization representatives during school hours. We reverse that part of the summary judgment which upholds Administrative Regulation 412's application to private teacher conversations and use of school media facilities by teachers employed in GISD schools as those media facilities are otherwise available to teachers for their personal messages. We grant appellants' motion for partial summary judgment holding the application of the Regulation to these activities unconstitutional.

AFFIRMED in part; REVERSED in part; and REMANDED for proceedings not inconsistent with this opinion.

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 85-1890

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, *et al.*

Appeal from the United States Court of Appeals
for the Fifth Circuit

Case below, 5 Cir., 777 F.2d 1046; 784 F.2d 1113.

Oct. 6, 1986. The judgment is affirmed.

THE CHIEF JUSTICE and Justice WHITE would note probable jurisdiction and set the case for oral argument.

Justice SCALIA took no part in the consideration or decision of this case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Plaintiffs,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants.

[Filed Aug. 24, 1984]

MEMORANDUM OPINION AND ORDER

The Garland Independent School District ("GISD") totally prohibits "employee organizations" [1]—such as the Texas State Teachers Association—from using the school mail system, the bulletin boards and the public address system. It also prohibits representatives of employee organizations from recruiting or having any meetings with teachers on school premises during "school hours." [2]

[1] "Employee Organization is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures." Both TSTA and GEA are employee organizations within the meaning of the GISD polices in question. Stipulation No. 5.

[2] The term "school hours" means "the entire period between 8:00 a.m. and 3:45 p.m. of each school day except for days when school may be let out early." Stipulation No. 22.

However, employee organizations are not prevented from recruiting or meeting with teachers on school premises before 8:00 a.m., and after 3:45 p.m. "upon request and approval by the local school principal" [3]—and they may distribute literature on school premises (parking lots, hallways, etc.) or place material on teachers' desks during non-school hours.[4]

This case involves a constitutional challenge to these GISD policies—which were promulgated by the Garland Board of Trustees [5] and which are implemented by the various principals of GISD schools. The plaintiffs are the Texas State Teachers Association ("TSTA"), a voluntary employee organization with members employed as GISD teachers; the Garland Education Association ("GEA"), a TSTA local affiliate; Joe Atkins, a TSTA employee; and Janice Hill, a GEA member employed as a GISD teacher. The defendants are the Garland Independent School District; Harris Hill, Donald Senter, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M.D. Williams, IV, in their official capacities as GISD Trustees; and Eli Douglas, in his official capacity as GISD Superintendent.

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[3] Under the summary judgment record before this Court, there is no evidence that any GISD principal ever denied permission for TSTA (or any other employee organization) to use school premises *during non-school hours* for recruiting, meetings, or distribution of literature. See footnote 11.

[4] Employee organizations may also contact the GISD teachers at school through the United States mail, or they may contact them at home either by mail or phone. Indeed, GISD will furnish any employee organization with the name, home address, and phone number of each GISD teacher so home contacts can be made.

[5] The challenged policies were adopted under Article VII, section 1 of the Texas State Constitution and section 23.26(d) of the Texas Education Code. Section 23.26(d) provides: "The trustees [of an independent school district] may adopt such rules, regulations, and by-laws as they may deem proper."

The parties have filed cross motions for summary judgment. There are no genuine issues of material fact. And, the legal issues have been settled—*and this Court's opinion is mandated*—by the 5-4 decision of the United States Supreme Court in *Perry Education Assn. v. Perry Local Educators' Assn.*, 103 S. Ct. 948 (1983) (summary judgment rejection of constitutional challenge to school policies prohibiting access to interschool mail system and teacher mailboxes). Accordingly, with one minor exception, the constitutional challenge is rejected, the plaintiffs' motion for sumary judgment is DENIED, and the defendants' motion for summary judgment is GRANTED.

The Challenge

On January 8 and 9, 1981, nine TSTA representatives, acting alone or in pairs, visited numerous GISD elementary, junior high, and high schools during school hours.[6] Relying on GISD Administrative Regulation 412, the principal or assistant principal at most schools refused to permit the TSTA representatives to distribute their literature or to meet with GISD teachers or the TSTA faculty representative.[7] At some schools, however, either the school principal or the school secretary—contrary to the GISD policies—granted the requests of the TSTA representatives.[8]

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[6] The plaintiffs assert that the primary purpose of these visits was to discuss the proposed new certification standards for Texas public school teachers. The defendants contest this, and claim that the primary purpose of the visits was to challenge the policies involved in this lawsuit. *The "real" purpose of these visits is not relevant to the disposition of the legal issues in this case*—since the GISD policies prohibit all meetings between TSTA representatives and teachers during school hours. See footnotes 7, 12, 13, 14.

[7] On each school campus, teachers who are TSTA members select one teacher-member to represent them.

[8] The deposition testimony establishes that, at two schools (Hillside and Rowlett), the principals permitted TSTA representatives

This lawsuit resulted. By it, the plaintiffs challenge the constitutionality of the GISD policies and practices which deny them access to GISD teachers.[9] In substance, the challenged policies prohibit all employee organizations from:

> (i) recruiting, organizing or discussing any other business with GISD teachers, whether TSTA members or not, on school premises during school hours;
>
> (ii) placing literature in the teacher mailboxes or using the school's internal mail service;
>
> (iii) using the bulletin boards or posting announcements or other materials anywhere on school premises; [10] and

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to meet with the teachers during school hours. *See* Wall Dep. at 13; Dorsett Dep. at 15-16. On other occasions, the TSTA representatives obtained permission from the school secretary to meet with the faculty—although, on one such instance, the school principal went to the lunchroom and told the TSTA representatives that they had to leave after lunch because they were violating school policy. Wall Dep. at 12. In the past, certain principals have been reprimanded for allowing materials to be distributed or items to be sold in violation of Board policy. Douglas Dep. at 54; Nix Dep. at 102.

[9] Only Policy Statement and Administrative Regulation 412 apply to employee organizations. Accordingly, the plaintiffs have standing to challenge only those two policies. Other policies, however, are relevant to their equal protection claims including: Policy Statements 425, 426, 535, 804, 804.1, 804.2, 807, and 808; and Administrative Regulations 425, 426, 535, 804.1, and 804.2. Also, Policy Statement 106.4 relates to the plaintiffs' due process claim. The Appendix to the parties' Stipulations, filed on December 14, 1982, contains a complete copy of each of these policies.

[10] The plaintiffs contend that there is no written GISD policy which specifically prohibits employee organizations from posting and/or distributing written material on school premises during school hours. School officials, however, have interpreted Adm. Reg. 412(8) to include bulletin boards—since that regulation prohibits employee organizations from using school district equipment or supplies. *See* Douglas Dep. at 20; Richey Dep. at 40. Other school

(iv) having any announcement read over the school public address system.

Specifically, the plaintiffs claim that these policies violate their First Amendment rights of free speech and free association—and are unconstitutionally vague and overbroad because they vest unfettered enforcement discretion in school administrators without providing sufficiently explicit guidelines. Further, the plaintiffs contend that school officials have granted access to other commercial and civic organizations during school hours in violation of the plaintiffs' rights to equal protection—and that GISD has violated their due process rights by failing to provide an administrative process to review enforcement decisions made by school administrators concerning these policies.

The defendants deny that these policies, either on their face or as applied, violate the plaintiffs' First and Fourteenth Amendment rights. They maintain that the GISD schools are not public fora—that, therefore, TSTA members are not entitled to exercise their First Amendment rights "whenever and however they choose"—and that, instead, those rights are subject to the reasonable time, place, and manner regulations promulgated by the GISD Board of Trustees. Further, the defendants contend that reasonable alternative methods of communication exist because TSTA members may communicate with faculty members by meeting with them on school premises before 8:00 a.m. and after 3:45 p.m.; by distributing literature in the parking lots or hallways or placing it on teachers' desks before 8:00 a.m. and after 3:45 p.m.;[11] and by

officials rely on the general policy of neutrality (Texas Education Code § 21.904) to justify the prohibition against posting employee organization literature.

[11] The plaintiffs claim that these are not "reasonable alternative" avenues of access because teachers *ordinarily* do not report to their classrooms until 8:00 a.m., they leave promptly at 3:45 p.m., and because the outside school doors are locked at 3:30 p.m. every day. Brank Dep. at 51-52; White Dep. at 15. Moreover, they claim that

contacting teachers at school or home through the United States Postal Service. Finally, with regard to use of the internal mail system, teacher mailboxes, public address system, and bulletin boards, GISD asserts that allowing an employee organization to use those means of communication "would not promote the learning process"—and that it would be contrary to Texas Education Code § 21.904, which requires the school district to maintain a position of neutrality with respect to employee membership in various organizations.[12]

Interpretation and Application of Adm. Reg. 412

Administration Regulation 412 absolutely prohibits representatives of employee organizations from recruit-

if a teacher's classroom door is locked prior to 8:00 a.m., school officials will not unlock it to allow TSTA representatives to place literature on the teacher's desk. Douglas Dep. at 77-78. Disputing these assertions, the defendants cite deposition testimony which establishes that school officials will in fact allow TSTA representatives to stand in the hallways or parking lots to hand out literature both before and after school hours; that at least one principal would unlock the outside doors for TSTA representatives to come in during non-school hours, and that, if classroom doors are locked, TSTA representatives may slip literature under the door. White Dep. at 21; Brank Dep. at 52-53; Douglas Dep. at 78-79.

If any school officials were to interpret the challenged policies in such a manner as to deny access to employee organization representatives during non-school hours, this would be directly contrary to stated Board policy. The Board policies do allow reasonable alternative access during non-school hours, and thus are constitutional. Moreover, even if teachers *normally* arrive just prior to 8:00 a.m. and depart promptly at 3:45 p.m., TSTA representatives may ask teachers to arrive early or stay late. The Board is not responsible for the refusal of any teacher to meet with a TSTA representative during non-school hours.

[12] Section 21.904 provides that "No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefitting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association. . . ."

ing, organizing, or meeting with GISD teachers on school grounds during school hours.[13] In addition, it denies employee organizations any access to the school's internal mail system, teacher mailboxes, bulletin boards, and public address system. Specifically, Adm. Reg. 412 provides:

> "Relationships with employee organizations will be consistent with Article 21-904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
>
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.

[13] In addition, the plaintiffs contend that several school officials have interpreted Adm. Reg. 412(5) to prohibit teachers from discussing TSTA business among themselves on school premises during school hours. *See* Beavers Dep. at 7; Roden Dep. at 65-66; Douglas Dep. at 71; Hardy Dep. at 55-56; White Dep. at 35-38. *But see* Brank Dep. at 22; Richey Dep. at 50-54; Collins Dep. at 21-23. The deposition testimony establishes, however, that even if some school officials do interpret Adm. Reg. 412 in that manner, *there has not been any attempt to enforce such an interpretation. See* White Dep. at 69-70; Beavers Dep. at 54-55. Should school officials seek to prohibit teachers from discussing organizational business among themselves during non-class time, that action would be unconstitutional. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

On the other hand, the record does indicate that, consistent with Texas Atty. Gen. Op. MW 89, school officials would prohibit teachers from promoting an employee organization or working for that organization during school hours. In that opinion, the Texas Attorney General held that the Ft. Worth Independent School District was in error for allowing teachers to perform employee organization business on a "release time" basis. Allowing release time work "constitutes an unconditional grant of public funds to a private organization and is therefore unconstitutional." Enforcement of that policy is constitutional.

> 3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.
>
> 4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
>
> 5. Group meetings or individual conferences conducted by an elected official[14] of any employee organization for purposes of membership recruitment or any other matter of business,[15] *shall not be conducted on school premises during school hours.* School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will de denied.

[14] The plaintiffs assert that GISD officials have interpreted the term "elected official" to include any employee organization representative, whether or not elected. Plaintiffs' Undisputed Facts ¶ 14(b). Accordingly, they argue, that portion of Adm. Reg. 412(5) is vague and overbroad. The record does establish that GISD officials focus on whether the representative is acting in his or her official capacity and is seeking to discuss some type of TSTA business, instead of personal matters—and, if so, the school official apparently assumes that that representative is an "elected official" covered by Adm. Reg. 412(5). That interpretation is consistent and reasonable—because *the regulations clearly seek to prohibit recruiting, organizational activities, and meetings about any other business between employee organization representatives and teachers on school premises during school hours.* Accordingly, whether or not a representative was elected is not relevant to the legal issues in this case.

[15] The plaintiffs assert that the term "or any other matter of business" includes "*any subject or topic whatsoever*, if it relates

6. The school mail service shall not be used by any employee organization.

7. Distribution of material directly in mailboxes at the school is prohibited.[16]

8. The use of school district equipment and supplies by any employee organization is prohibited.

9. The public address system is for school business only. Association announcements shall not be made on school equipment."

By contrast, other Board policies give school principals the discretion to permit selected visitors to meet with teachers during non-class school hours, to distribute literature through the mail system, to post notices, or to have announcements made on the public address system.

(i) *Visitation Privileges*

For example, Policy Statement 804.2 requires principals to be prepared to receive and make welcome all district personnel, patrons, educators from other school

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in any way to TSTA or to any other employee organization." Plaintiffs' Statement of Undisputed Facts at ¶ 14(d). The defendants dispute that statement to the extent that it may imply that Adm. Reg. 412 prohibits meetings not related to recruiting, organizing, or some TSTA business. The summary judgment record establishes, however, that Adm. Reg. 412 prohibits only meetings during school hours concerning some type of TSTA business—and would not, for example, prohibit a TSTA representative from meeting with a teacher on a purely personal matter, such as a parent-teacher conference concerning the child of the TSTA representative.

[16] Administrative Regulation 412(7) prohibits all persons (except school staff) from distributing material directly into teacher mailboxes. The plaintiffs do not contest this "prior review" requirement, but instead assert that they should be allowed to submit TSTA literature for distribution in the teacher mailboxes in the same manner as any other organization.

districts, and other visitors.[17] Policy Statement 425 allows salesmen and other solicitors to meet with GISD teachers at school during school hours if they receive prior permission from the school principal.[18] It provides:

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[17] The primary purpose of Policy Statement 804.2 is to improve school-community relations and to increase the prestige of GISD in the eyes of other educators. It provides:

> "Visitation by members of the community to the school is recognized as a vital part of the process of improving school-community relations. Visitation by educators from other institutions is also vital in establishing the reputation of the school district. . . ."

[18] The defendants vigorously protest the assertion that GISD policies permit other commercial and civic organizations to meet with faculty and students during the school day. They claim that the principals have been instructed administratively not to allow such visits. The defendants, however, fail to cite any policy or testimony that substantiates their claim. Moreover, the policies specifically state that salesmen and representatives of other organizations may confer with teachers during the school day, on matters concerning school-sponsored or related activities, if they receive the principal's permission. To instruct the principals not to give their permission would make senseless a policy that allows them that discretion. Further, the deposition testimony establishes that school principals have allowed various salesmen and civic group representatives to meet with faculty and students during the school day. *See* White Dep. at 55-57 (fund-raising activities, school equipment); Richey Dep. at 28 (textbook salesman); Nix Dep. at 61-64 (cookware salesman before school); Hardy Dep. at 65-66, 70 (Boy Scout representative, MS volunteer, PTA president).

Although Policy Statement 425 is not at issue here, this Court feels compelled to note that it is unconstitutionally overbroad. As to certain civic and commercial organizations, the GISD schools are limited public fora. For that reason, regulations affecting First Amendment rights must be narrowly and precisely drawn. The policy itself does not provide sufficient guidelines to limit the discretion of school principals. Accordingly, it fails to meet the constitutional standards for such a restriction. *See Ysleta Fed. of Teachers v. Ysleta Indep. School Dist.*, 720 F.2d 1429 (5th Cir. 1983); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972).

> "Solicitors, vendors or salesmen shall not be permitted to confer with students or employees during school hours *without prior approval of the administrator in charge*. . . ." (emphasis added).

Policy Statements 804, 804.1, and 807 clarify Policy Statement 425 by limiting salesmen's visits to school-sponsored or related activities and by prohibiting such meetings from interfering with class time. In addition, Adm. Regs. 804.2(5) and (6)(d) require all visitors to report to the principal's office before visiting elsewhere in the building, and prohibit all visitors from roaming through the building unescorted.

(ii) *The Mail System, Bulletin Boards, and Public Address System*

The primary purpose of GISD's internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. [*See* Richey Dep. at 58-60]. On occasion, however, school principals have allowed certain commercial and civic organizations to submit literature for distribution through that system. [Douglas Dep. at 48-54—Board-approved insurance companies, PTA, Little League; White Dep. at 64—Junior Achievement; Nix Dep. at 91—teacher consultants; Brank Dep. at 44-45—YMCA, Boy Scouts, Girl Scouts; Beaver Dep. at 40].

With respect to advertising and commercial announcements, Policy Statement 808 provides:

> "Advertising and commercial announcements shall be made in the schools only upon approval of the superintendent or his designee. Approved announcements shall be made by the principal. *Advertisements may not be posted or distributed on the school premises.*"

School officials, however, do allow such organizations as the YMCA, Boy Scouts, Brownies, Little League, and Board-approved insurance companies to post materials. [*E.g.*, Douglas Dep. at 23-25]. In addition, school officials allow the same or similar organizations to submit announcements to be read over the public address system.

The Status of the GISD Policies Under Perry

There is no question that constitutional interests are implicated by the GISD policies. However, as emphasized in *Ysleta Federation Teachers v. Ysleta Independent School District*, 720 F.2d 1429 (5th Cir. 1983):

> "'The First Amendment's guarantee of free speech applies to teachers' mailboxes as surely as it does elsewhere within the school . . . and on the sidewalks outside.' *Perry*, —— U.S. ——, ——, 103 S.Ct. 948, 954, 74 L.Ed.2d 794, 804 (citations omitted). However, the federal courts have always recognized that in the school context, *judicial respect for the free exercise of First Amendment rights by teachers and students must be tempered by a recognition that school administrators have broad latitude in formulating and administering regulations to promote the safety and order necessary to the educational process. See Hall*, 681 F.2d at 967-68." (710 F.2d at 1432) (emphasis added).

Moreover, as *Ysleta* notes, in analyzing the GISD policies, *this Court is bound* by "the Supreme Court's recent and comprehensive discussion in [*Perry Education Association v. Perry Local Educators' Association*, 103 S.Ct. 948 (1983)] of the standard by which to evaluate limitations on the right of access" to the premises and facilities of a public school.[10]

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[10] *Perry* and *Ysleta* dealt only with access to a school's internal mail system. However, the *Perry* analysis applies equally to bulletin boards, public address systems, and other school facilities—so long,

Under *Perry*, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry*, 103 S.Ct. at 954. Not all public property constitutes a First Amendment "public forum." Instead, public property falls into one of three categories:

> (i) property "which by long tradition or by government fiat [has] been devoted to assembly and debate" (*"quintessential public forums"*);
>
> (ii) "property which the state has opened for use by the public as a place for expressive activity" (*"limited public forums"*); and
>
> (iii) "property which is not by tradition or designation a forum for public communication" (*non-public forums*). *Id.* at 954-56.

Where the property in question falls within the first or second category, the state may regulate the content of speech only by narrowly tailored laws designed to effectuate a compelling state interest—in addition, the state may enforce reasonable, content-neutral time, place, and manner restrictions. Where the property in question falls within the third category, however, the state not only may impose reasonable time, place, and manner restrictions, but also "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress merely because public officials oppose the speaker's view." *Perry*, 103 S.Ct. at 954-955.

Accordingly, the status of the GISD policies under the *Perry* analysis—i.e., whether they violate the plaintiffs' constitutional rights of free speech, free association, and

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as here, there are alternative means of communication. See footnote 10.

equal protection—depends first, on the nature of the forum, and second, on the nature of the policies.

Nature of the Forum

Although a school may be a traditional public forum for teachers and students—*See County Hills Christian Church v. United School District 512*, 560 F.Supp. 1207, 1214-15 (D.Kan. 1983) (cited with approval by the Fifth Circuit in *Ysleta*, 720 F.2d at 1435)—it is not a public forum for other groups unless the school district has opened its doors for use by those groups. *Perry*, 103 S.Ct. at 956. Moreover, even if the school district has granted access during school hours to representatives of certain groups, "the constitutional right of access would in any event extend only to other entities of similar character." *Perry*, 103 S.Ct. at 956. In short, "[t]his type of content-neutral selective access does not transform goverment property into a public forum." *Id.*

GISD has not granted permission as a matter of course to all who seek access to school facilities during school hours. *See Perry*, 103 S.Ct. at 956. Instead, the GISD policies in question permit selected groups of educators, salesmen, and representatives of civic and charitable organizations to meet with students and faculty during non-class school hours.[20] In addition, those same groups may submit materials for distribution through teacher mailboxes or for posting on school premises, and they may submit announcements to be made on the public address system. Those persons seeking access must obtain prior permission from the school principal and, in some cases, from the Superintendent's Office. In each case, the policies carefully limit the access of selected visitors by requiring them to report to the principal's office before visiting other parts of the campus, by prohibiting visitors

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[20] So long as the meetings concern school sponsored or related activities and do not interfere with class time. *See* Policy Statements 804, 804.1, and 807.

from roaming around the campus unescorted, and by directing the school principals to take every precaution necessary to ensure that the visitors do not interrupt classes. Such selective, carefully-monitored visitation access does not cause the GISD schools to become a public forum for First Amendment purposes. *See Perry*, 103 S.Ct. at 956.

In addition, the school district has not permitted any employee organization to use the internal mail system, bulletin boards, or public address system, nor has it opened these school facilities to unrestricted use by the general public. Accordingly, under *Perry*, none of these facilities constitutes a limited public forum as to employee organizations.[21] Because the defendants have not, either by policy or practice, transformed either the school building, the surrounding premises or the internal facilities into a limited public forum for employee organizations, *Perry* permits the GISD Board to promulgate time, place, and manner restrictions along with other regulations designed to "reserve the forum for its intended

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[21] Even if the GISD had created a limited public forum by permitting such selective visitation and use of the mail systems, bulletin boards and public address system, only members of groups similar to the ones already allowed access would enjoy a constitutional right of access. It is undisputed that GISD policies deny the right of access to all employee organizations. Accordingly, no employee organization would enjoy such a right. As *Perry* states:

> "Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a 'limited' public forum, the constitutional right of access would in any event extend only to the other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, *they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.*" 103 S.Ct. at 956 (emphasis added).

use," so long as those regulations are both reasonable and content-neutral.[22]

Reasonableness of the Policies

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity, . . . [so long as] they are reasonable in light of the purpose which the forum at issue serves." *Perry*, 103 S.Ct. at 957. The defendants correctly argue that the exclusion of employee organizations, while granting access to selected groups—such as the Boy Scouts, the PTA, and other civic and community organizations, is reasonable in light of a school's function. In particular, the defendants make these arguments:

> Schools exist as places of learning. The school day, while relatively short, is intense. With little free time, teachers must focus constantly on their two primary responsibilities—teaching and maintaining order and discipline. Even during their thirty minute lunch break, most teachers must remain on the school premises and help maintain order in the school cafeteria. In short, the school day is simply too limited for the discussion of matters not related to either the curriculum or student welfare.

The GISD Board of Trustees promulgated Policy Statement and Administrative Regulation 412 to ensure that the school district maintains a position of neutrality with respect to employee organizations as

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[22] The plaintiffs vigorously assert that the *Tinker-Shanley* test applies here. Under that test, school officials may prohibit expressive conduct only if it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). That test, however, applies only to a public forum. *See Connick v. Meyers*, 103 S.Ct. 1684, 1692 & 1692 n.12. *Tinker*, unlike this case, dealt with the First Amendment rights of *students* for whom a school is a public forum.

> required by state law, and to prevent employee organizations from distracting teachers away from their teaching duties during school hours. These policies are reasonable because they protect the learning process from outside interference, while permitting limited contacts by selected civic and commercial organizations—so long as these contacts concern school-sponsored or related activities and do not interfere with classes.[20]

These are valid considerations and, under *Ysleta*, school administrators must be afforded some, if not "broad latitude in formulating and administering regulations to promote the safety and order necessary to the educational process." 720 F.2d at 1432. In addition, the school mail system, bulletin boards, and public address system are designed to transmit "official messages." In most schools, student announcements constitute the bulk of the information transmitted. Allowing these announcements is perfectly reasonable because they relate to school or community-sponsored events that constitute part of the overall learning process. Moreover, the record establishes that, on those occasions when a school principal has allowed a salesman to meet with teachers during school hours, the meeting concerned school equipment, textbooks, or other items related to the learning process. The terms and conditions of teacher employment do not bear *directly* on either the curriculum or other aspects of the learning process. The distinction between civic and commercial groups sponsoring events or selling items related to the learning process and employee organizations con-

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[20] *Perry* notes that if a teachers union "were given access to the mailboxes, it would be equally imperative that any other citizen's group or community organization with a message for school personnel—the chamber of commerce, right-to-work groups, or any other labor union—also be permitted access to the mail system . . . [This] would invite schools to close their mail systems to all but school personnel." *Perry*, 103 S.Ct. at 957, note 9.

cerned with the terms and conditions of teacher employment rests on the identity of the organization and the subject matter sought to be discussed. Accordingly, that distinction is both content-neutral and reasonable. *Perry*, 103 S.Ct. at 957-58.

Finally, just as in *Perry*, the reasonableness of the GISD limitations on the plaintiffs' access to teachers during school hours "is also supported by the substantial alternative channels that remain open for union-teacher communication to take place." Here, these means range from meetings and distribution of literature on school premises *during non-school hours* to contacts with the teachers at home. *See* footnote 10; *Perry*, 103 S.Ct. at 959. Just as in *Perry*:

> "There is no showing here that [the plaintiffs'] ability to communicate with teachers is *seriously impinged* by the restricted access to the [GISD facilities]. The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access. See, *e.g.*, *Greer v. Spock*, 424 U.S., at 839, 96 S.Ct., at 1218 (servicemen free to attend political rallies off-base); *Pell v. Procunier*, 417 U.S. 817, 827-828, 94 S.Ct. 2800, 2806, 41 L.Ed. 2d 495 (1974) (prison inmates may communicate with media by mail and through visitors)." 103 S.Ct. at 959 (emphasis added).

Therefore, *Perry* compels this Court to find that the GISD policies do not violate the plaintiffs' constitutional rights to free speech, free association, or equal protection. However, two additional claims must be addressed.

Vagueness and Overbreadth

Contrary to the plaintiffs' assertions (and with the exception noted below), the challenged policies are neither vague nor overbroad. In clear, specific terms, Adm. Reg.

412 prohibits representatives of employee organizations from recruiting, organizing or meeting with teachers on school premises during school hours. And, it prohibits employee organizations from using the school mail system, the teacher mailboxes, the bulletin boards, and the public address system. *These prohibitions are absolute*, leaving school principals with no discretion to alter them. Moreover, they are suspectible to only one reasonable interpretation. In the rare instance in which a school principal has allowed a TSTA representative to confer with a teacher during school hours, he did so in conscious disregard of the GISD policy. Accordingly, Adm. Reg. 412 is neither vague nor overbroad, either on its face or as applied.

However, the first sentence of subsection 4 and the second sentence of subsection 5 permit employee organization [sic] to use school premises for meetings during non-school hours "upon request to and approval by the local school principal." Because this "prior clearance lacks the guidelines, criteria or standards that would render the rule constitutionally acceptable by limiting the discretion" of the GISD principal, those portions of Adm. Reg. 412 are unconstitutionally overbroad. *Ysleta*, 720 F.2d at 1434. *See Shanley v. Northeast Independent School District*, 462 F.2d 960, 976 (5th Cir. 1972). But in this case—where there is no evidence that any GISD official refused to permit the plaintiffs to use school premises during non-school hours (see footnotes 3, 10)—this exception is of minor significance.

Administrative Review

The plaintiffs assert that GISD failed to provide an administrative process to review adverse decisions by principals concerning the challenged policies, and that this failure violates their constitutional rights to due process. The defendants respond that Policy Statement 106.4, governing complaints, sets forth a specific, expedited review process that satisfies the requirements of *Shanley v. Northeast Independent School District*, 462 F.2d 960, 977-78 (5th Cir. 1972).[24]

The defendants are correct. Policy Statement 106.4 provides a specific, expedited means of complaining about a principal's interpretation or implementation of GISD policies. The plaintiffs did not request a copy of this Policy Statement nor, apparently, did they make a formal complaint to the principals involved, as required by Policy Statement 106.4.[25] In addition, 19 T.E.C. § 61.231 provides for a hearing before the local school board for "grievances or controversies involving administration actions or problems . . . provided request in writing has been timely filed . . . as prescribed in § 157.43 . . . of this title." The record does not establish that the plaintiffs timely filed a hearing request. Accordingly, the plaintiffs were not denied due process.

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[24] The Parties' Stipulations, filed on December 14, 1982, contain a complete copy of Policy Statement 106.4. It specifically provides:

> "The procedures outlined in the above paragraphs shall be available to parent advisory councils, parents, *teachers, and other concerned organizations or individuals,* and shall be disseminated to interested parties, *including school district employees,* parent-teacher organizations, ESEA Title I district and campus parent advisory committees *and anyone else requesting a copy of these procedures.*" (emphasis added)

[25] The plaintiffs argue that, on December 30, 1980, Frank Hill (TSTA counsel) wrote to GISD official Harry Beavers "suggesting a conference between T.S.T.A. and the Garland I.S.D. administration for the purpose of discussing and perhaps developing alternatives or modifications to the policies and practices . . ." at issue. The defendants never responded to that request because, according to them, such a conference would have been fruitless since the Board of Trustees, not the school administration, formulates school district policies. Whether fruitless or not, the defendants should have responded to the Hill letter by informing the plaintiffs of the proper procedure by which to challenge Board policies. On the other hand, the plaintiffs, aided by legal advice at that point, could have requested a formal hearing before the GISD Board of Trustees, but failed to do so.

In any event, under Adm. Reg. 412, school principals do not have the discretion to grant access to the school premises during school hours to representatives of employee organizations. Accordingly, any administrative review of a decision to follow Adm.Reg. 412 would be fruitless. An employee organization must either request a hearing before the GISD Board of Trustees, or, as the plaintiffs did, file a lawsuit. Moreover, if an employee organization should be denied permission to hold a meeting on school premises during non-school hours, it certainly may appeal by following the procedures outlined in Policy Statement 106.4. Accordingly, the due process rights of employee organizations are protected.

For the reasons discussed, the Plaintiff's Motion for Summary Judgment is DENIED, with the exception that the stated portions of Adm. Reg. 412(4) and (5) are unconstitutionally overbroad. With the same exception, defendants' Motion for Summary Judgment is GRANTED. Since the plaintiffs are not "prevailing parties" under 42 U.S.C. § 1988,[26] and since their suit was certainly not frivolous or brought in bad faith, neither side is entitled to an award of attorneys fees. Costs, however, are taxed against the plaintiffs.

SIGNED this 24 day of August, 1984.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

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[26] Because of *Perry*, the *only* issue on which the plaintiffs prevailed was one of minor significance in this case (see footnotes 3, 10), since there was no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours. *See Hensley v. Eckerhart* 103 S.Ct. 1933 (1983).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1221

D.C. Docket No. CA-3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

versus

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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Before GOLDBERG, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

February 8, 1988

GOLDBERG, Circuit Judge, dissenting.

Issued as Mandate: Mar. 1, 1988

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUN 23 1988
CLERK

NO. 87-1759

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

May a Plaintiff who achieved none of the benefit sought in bringing the suit but who prevailed on a secondary issue which arose during the course of the litigation, be a "prevailing party" for purposes of an attorney's fees award under 42 U.S.C. § 1988.

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Garland Independent School District Administrative Regulation No. 412 2

NO. 87-1759

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al,*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioners seeking review of the Judgment in the United States Court of Appeals for the Fifth Circuit which affirmed the Judgment of the district court in this cause.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners,[1] Texas State Teachers Association (TSTA) and Garland Education Association (GEA), are affiliated teachers' unions. Petitioner Atkins was a representative of TSTA, and Petitioner Hill was President of GEA, a member of TSTA and a teacher at the Garland Independent School District (GISD).[2]

The facts giving rise to Petitioners' action are undisputed. Essentially, on January 8 and 9, 1981, nine TSTA representatives, acting alone or in pairs, visited numerous GISD schools during school hours but were refused permission to distribute their literature or to meet with GISD teachers or the TSTA faculty representative. The school officials based their refusal on Administrative Regulation 412 which provides:

> RE: Professional Freedoms and Individual Rights
>
> The Garland Independent School District, its Board of Trustees, the Superintendent, assistant superintendents, principals, other administrators, and supervisors shall not directly or indirectly require, coerce, or unduly influence any employee of the District as respects:
>
> 1. joining, or not joining, any group, club, committee, organization, or association; or
> 2. participating in, or refraining from participating in, political affairs in the community, state, and nation.
>
> No District funds, vehicles, facilities (during scheduled school time or employee working time) shall be used in any manner in political activities; however, this policy does not prohibit the use of school facilities as voting places for elections during scheduled school time.
>
> Relationship with employee organizations[3] will be consistent with Article 21.904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.
> 3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.
> 4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

[1] Petitioners were Plaintiffs and Appellants below.

[2] The GISD is an independent school district organized pursuant to the laws of the State of Texas for the purpose of operating public schools. It employs approximately 1,700 teachers at 46 schools, and enrolls approximately 30,500 students from kindergarten through the twelfth grade. (Rec. pp. 192, 193, 202 — Stipulations 8, 14 and 15).

[3] The parties have stipulated that the TSTA and GEA are "employee organizations" whose main purpose is to represent a group of employees in matters of employment practices and procedures.

5. Group meetings or individual conferences conducted by an elected official of any employee organization for purposes of membership recruitment or any other matter of business, shall not be conducted on school premises during school hours. School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

6. The school mail service shall not be used by any employee organization.

7. Distribution of material directly in mailboxes at the school is prohibited.

8. The use of school district equipment and supplies by any employee organization is prohibited.

9. The public address system is for school business only. Association announcements shall not be made on school equipment.

The school district's refusal to permit union access to the teachers during school hours on campus and refusal to permit union utilization of the school mail service resulted in this lawsuit. On March 31, 1981, Petitioners filed a Complaint against the GISD, its Board of Trustees and its Superintendent, seeking damages under 42 U.S.C. § 1983 and injunctive and declaratory relief, alleging that some of the GISD policies were unconstitutional as written and as applied. The only allegations in the Complaint about the GISD policies were in regard to the union's access to the teachers and mail facilities at the school during school hours. (R. Vol. 1, p. 1-9). There is no mention in the Com-

plaint of the only point on which Petitioners finally prevailed in regard to the teachers' communications with other teachers. Due to the importance of the Complaint in determining what the issues in this case were, the Complaint is attached hereto as Appendix A for the Court's convenience.

Petitioners and Respondents filed respective Motions for Summary Judgment. (R. Vol. 1, p. 23; R. Vol. 3, p. 1).

On August 24, 1984, Judge Buchmeyer entered his Memorandum Opinion and Order ruling in favor of the Respondents, with the exception of a ruling regarding vagueness of portions of the regulation as applied, which the Court described as "one of minor significance to this case". (R. Vol. 2, p. 373-393, n. 26; Petitioners' App. 40a) The district court opinion dealt with the teachers' communications among themselves, the only issue on which the Petitioners finally prevailed, in a footnote to its opinion and found that factually the District does not enforce an interpretation of the regulation in a manner to prohibit teachers from discussing union business among themselves. (R. Vol. 1, p. 379, n. 13; Petitioners' App. 46a).

Petitioners appealed. The Fifth Circuit panel decision affirmed the district court in all respects except it reversed on the issues regarding the teachers' communications with other teachers orally and through the school mail system. The reversal was based on an evidentiary finding that the District "would", if the occasion ever arose, interpret the regulation to prohibit teacher to teacher communications on union business and, therefore, the regulation as applied in such a manner would be unconstitutional. The panel also held that since GISD allowed teachers to use the school mail system to communicate with each other on any subject, they could also communicate on matters relating to the union. The panel let the requlation stand as written. *Texas State*

Teachers Association, et al. v. Garland Independent School District, et al., 777 F.2d 1046 (5th Cir. 1985), reh. en banc den. 784 F.2d 1113 (1986). Since the panel's decision regarding teachers' conversations was based on a future and hypothetical interpretation, rather than on a present controversy involving Administrative Regulation 412, Respondents appealed to this Court, which affirmed the panel decision. *Garland Independent School District, et al. v. Texas State Teachers Association, et al,* ___U.S.___, 107 S.Ct. 41 (1986).

The second issue presented in the appeal concerned whether the union, which does not have direct access to the school mail system, can achieve the same access by having a teacher, rather than an outside member of the union, place the materials in the mail system for distribution by the school to all teachers. This issue has been answered by this Court's recent decision in *Regents of the University of California v. Public Employment Relations Board,* ___U.S.___, 108 S.Ct. 1404 (1988), which would prohibit the school's distribution of mail on behalf of the union. In fact, this decision prohibits distribution of any materials by the school on behalf of the teachers, including even teachers' private communications.

On remand to the district court, Petitioners filed a Motion for Attorneys' Fees seeking reimbursement for *all* attorneys' time expended since the inception of this suit. (R. Vol. 5, p. 404).

On March 3, 1987, Judge Buchmeyer entered his Memorandum Opinion and Order that Petitioners were not the prevailing party and were, therefore, not entitled to attorneys' fees under 42 U.S.C. § 1988. (Petitioners' App. 16a) The Fifth Circuit agreed with the district court that Petitioners were not prevailing parties and were not eligible for an award of attorneys' fees and affirmed the district

court decision. The panel decision was split with Justices Williams and Higginbotham affirming the district court decision and Justice Goldberg dissenting. *Texas State Teachers Association, et al. v. Garland Independent School District, et al.*, 837 F.2d 190 (5th Cir. 1988).

The panel found that Petitioners did not succeed on the central issue of their suit nor did they obtain the primary relief sought. Judge Williams stated:

> The main thrust of this lawsuit was Appellants' attempt to open up GISD school campuses during school hours to outside representatives of employee organizations like TSTA and GEA and to allow such organizations the use of school communications facilities. Appellants failed in this attempt, and this was the primary relief sought in this lawsuit.... The central issue in this case was employee organization access to GISD campuses, not internal teacher communcations within these campuses.

Texas State Teachers Association, et al. v. Garland Independent School District, et al., 837 F.2d at 192.

Not only was access the central issue, it was the only issue pled. The teacher communication issue on which Petitioners prevailed was not an issue, either factually or legally, in the Complaint. The basis for the issue emerged during deposition answers to hypothetical questions in which some, but not all, of the GISD administrators gave their individual interpretations of the Regulation in this regard. Petitioner Janet Hill was also a teacher at GISD and could have sought class representation for the teachers, but, this was not an action brought for the protection of the teachers' rights. This case was brought by the unions and their representatives seeking to establish rights to be exercised by the unions. They did not gain any rights or bring about any change from any current practice at the GISD.

SUMMARY OF THE ARGUMENT

The panel's decision, which applied the central issue standard to determine that Petitioners were not the prevailing party in this case, is not contrary to this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), or any other decision of this Court. The *Hensley* decision did not establish the standard used in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), or any other standard which would conflict with the decision in this case, as the standard to be applied for purposes of determining prevailing party status. In fact, this Court referred to the *Nadeau* standard as a "generous" one, thereby indicating that it may be more than intended by Congress.

The central issue standard is set forth in *Parker v. Matthews*, 411 F.Supp. 1059 (D.D.C. 1976) which is cited by H.R. Rep. No. 94-1558 as an example of the congressional intent in regard to prevailing party status. Not only is this standard approved by the legislative history, it is also a reflection of sound judicial policy to prevent the proliferation of civil rights litigation for the purposes of collecting attorney's fees.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *HENSLEY V. ECKERHART*.

Contrary to Petitioners' assertion, the *Hensley* decision neither accepted or rejected any particular Circuit's standard for determining when a party is a prevailing party. The *Hensley* decision dealt with the amount of the attorney's fees rather than the initial entitlement to fees.

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983), involved an initial three-count complaint filed in 1972. Count I challenged the constitutionality of treatment and conditions at a state hospital. Count II challenged the placement of patients without procedural due process and was resolved by consent decree. Count III sought compensation for patients who performed institution-maintaining labor and was mooted in 1974 when the hospital began paying for labor. In 1975, the complaint was refiled containing the original Count I on conditions at the hospital and containing a Count II seeking back wages for the inmate labor, but Count II was voluntarily dismissed. In August 1979, following a three-week trial on Count I, the district court entered a judgment in favor of the Plaintiffs holding they had a constitutional right to minimally adequate treatment and conditions.

The Plaintiffs then requested attorney's fees from 1975, when the second complaint was filed, through the trial. The district court first determined that the Plaintiffs were prevailing parties and then awarded them the requested fees, reduced minimally for the inexperience of one attorney and failure to keep contemporaneous records. Also, the district court declined any enhancement factor. The Eighth Circuit affirmed without written opinion.

This Court granted certiorari to address the issue of recovery of attorney's fees for legal services on unsuccessful claims. *Hensley*, 461 U.S. at 426, 103 S.Ct. at 1936.

The opinion sets forth the existence of the threshold requirement for attorneys' fees that the plaintiff must be a "prevailing party". Justice Powell then recognizes that the standard for determination of prevailing party status has been "framed in various ways". The opinion does not adopt or reject any of the various formulations. It only refers to

the First Circuit standard in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) as "typical". In fact, the only commentary on the First Circuit standard made by the Court was that it was a "generous formulation". *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Justice Powell also references cases from the Seventh and Ninth Circuits and quotes from *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981) that the "proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought." *Hensley*, 466 U.S. at 434, n. 8, 103 S.Ct. at 1939, n. 8. The Court's opinion did not adopt any of these positions.

Respondents take issue with Petitioners statement at p. 13 of their Petition for Writ of Certiorari that the *Hensley* case stated that the "prevailing party" requirement is *intended* to be a "generous" one. The court made no such statement, it merely referred to the *Nadeau* formulation as "generous". *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939.

Ever since the *Hensley* decision, the Fifth Circuit has interpreted it as a mandate to first ascertain that the plaintiff was the "prevailing party", then to set fees based on the degree of success of the prevailing party. See *Davis v. West Community Hospital*, 755 F.2d 455, 468 (5th Cir. 1985). This analysis was correctly carried over to the panel decision in this case in which the opinion stated that the *Hensley* court "merely accepted the 'generous formulation' of the 'prevailing party' definition found in some circuits but did not hold it to be the only correct definition." The panel went on to note that:

> Clearly the "prevailing party" issue is a threshold inquiry to be made by a district court prior to the exercise of its discretion in deciding whether to award attorney's fees under §1988. If plaintiffs are not the "prevailing parties" under §1988, then they are not even eligible for an attorney's fees award.

Texas State Teachers Association, et al. v. Garland Independent School District, et al., 837 F.2d 190, 192 (5th Cir. 1988).

This Court has recognized that there is some quantum of relief required to be a prevailing party even though it has not determined the boundaries of the requirement. In *Maher v. Gagne*, 448 U.S. 122, 131, 100 S.Ct. 2570, 2575 (1980), Justice Powell stated that "Nor can we accept petitioners' contention that respondent did not gain *sufficient* relief through the consent decree to be considered the prevailing party." (emphasis added).

Many of the post *Hensley* circuit decisions which adopted the *Nadeau v. Helgemoe* standard, acknowledge that this Court did not adopt that test as the only standard for prevailing party status.[4] Most subsequent Supreme Court decisions on attorney's fees have primarily involved computation matters to determine the amount of the fee award to the prevailing party and have not given any indication that *Hensley* established a test to determine the threshold question of whether the plaintiff is a prevailing party. The opinions all start the discussion based on the premise that the plaintiff was the prevailing party. See *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686 (1986); *Webb v. Board of Education of Dyer County*, ___U.S.___, 105 S.Ct. 1923 (1985).

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[4] "...the Supreme Court's opinion does not state in so many words that the standard we have just quoted is the only permissible one under § 1988. The Supreme Court's opinion says only that the standard quoted is '[a] typical formulation'" *Fast v. School District of City of Ladue*, 728 F.2d 1030, 1032, n.2 (8th Cir. 1984).

"...the Supreme Court did not prescribe one uniform articulation of the prevailing party standard in *Hensley*." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 911 (3rd Cir. 1984).

In *Hewitt v. Helms*, ___U.S.___, 107 S.Ct. 2672 (1987), this Court did embark on a discussion of prevailing party status within the facts presented by that case.[5] Judge Scalia reiterated that in order to be eligible for attorney fees the litigant must be a "prevailing party" and opened his discussion acknowledging the lack of definition to the term by stating: "Whatever the outer boundaries of the term may be...." The most notable aspect of the *Hewitt* opinion, including the dissenting opinion, is the complete absence of any mention of *Hensley v. Eckerhart* or the "typical formulation" mentioned therein as the standard to be applied to determine whether the plaintiff is the prevailing party in a case. Judge Scalia and the dissenting Justices would not have ignored the *Hensley* decision in regard to the standard to be applied to determine whether a plaintiff is a prevailing party if in fact the *Hensley* decision did set forth such a standard as Petitioners allege. The *Hewitt* opinion's lack of mention or reliance on *Hensley* completely refutes Petitioners' claim that *Hensley* set forth the *Nadeau v. Helgemoe* language as the standard to be applied.

II. THE DECISION BELOW REFLECTS CONGRESSIONAL INTENT AND SOUND JUDICIAL ADMINISTRATION

Congress passed the Civil Rights Attorney's Fees Award Act of 1976 in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95

[5]The case presented the "peculiar-sounding question of whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney fees." The claim on which the plaintiff sought fees was an appellate ruling that his complaint should not have been dismissed for failure to state a constitutional claim. Judge Scalia held: "That is not the stuff of which legal victories are made." *Hewitt*, ___U.S.___, 107 S.Ct. at 2674, 2675.

S.Ct. 1612 (1975), holding that without statutory authorization, a prevailing litigant was not entitled to recover attorney's fees. S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p. 5909.

While Congress did not define the term "prevailing party" as used in 42 U.S.C. §1988, it attempted to explain the meaning of the term in the House and Senate Reports accompanying the bill.

Congress intended that the standard for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act and both the House and Senate Reports cited numerous cases as examples to be followed. H.R. Rep. No. 94-1558 and S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p. 5912. One such case cited by H.R. Rep. No. 94-1558 is *Parker v. Matthews*, 411 F.Supp. 1059 (D.D.C. 1976), aff'd sub nom *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977).

The *Parker* decision was the first enunciation of the central issue standard which became the standard for the Fifth Circuit.[6] Absent a definition of "prevailing party", the district court in *Parker* relied on the plain meaning of the language of the statute for its decision and first looked at Black's Law Dictonary (rev. 4th ed. 1968, p. 1352) which contained the following definition for "prevailing party":[7]

> That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention. [citations omitted].

[6]The Fifth Circuit formally enunciated the "central issue" test in *Iranian Students Association v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979), citing *Howard v. Phelps*, 443 F.Supp. 374 (E.D. La. 1978), which relied on *Parker v. Matthews*, 411 F.Supp. 1056 (D.C. D.C. 1976).

[7]This is still the definition for prevailing party contained in the most current edition of Black's Law Dictionary, (rev. 5th ed. 1979).

> To be such [a prevailing party] does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, had successfully maintained it." [citations omitted].

Parker, 411 F.Supp. at 1063.

The district court then concluded that to be a "prevailing party" within the meaning of 42 U.S.C. 2000e-5(k) does not require the securing of a judgment after trial and fees may be awarded when there has been a settlement. The court stated that "prevailing party" status must be determined by:

> . . . a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the *central issue* — discrimination. (emphasis added).

Parker, 411 F.Supp. at 1064.

The only issue decided on the appeal of the *Parker* case was that attorney's fees could be awarded for the preliminary administrative hearing. In the circuit court's Appendix on Legislative History it noted that the lower court decision in *Parker* had been cited by H.R. Rep. No. 94-1558 for the proposition that the phrase "prevailing party" was not limited to awards only after entry of a final judgment following a full trial on the merits. The circuit court still felt it should rely on the lower court decision in regard to the issue on appeal and stated:

> Although this passage [H.R. Rep. No. 94-1558] does not cite the lower court decision for the precise point in question here, we doubt that the decision would have been cited despite disagreement with a major issue in the case, i.e., whether attorney's fees can be awarded for services rendered in the administrative proceedings — an issue which was obviously relevant to the subject of the report.

Parker, 561 F.2d at 320.

Likewise, H.R. Rep. No. 94-1558 surely would not have cited *Parker* if it disagreed with the central issue analysis for prevailing party status.

The stated purpose of the Civil Rights Attorney's Fees Awards Act is to ensure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, "but which do not produce windfalls to attorneys". S. Rep. No. 94-1011, 94th Cong., 2d Session (1976), U.S. Code Cong. & Administrative News 1976, p. 5913. This is a delicate balance which does require standards to be met in order to avoid windfalls to attorneys. The Fifth Circuit's central issue test requires a nexus between the claim as brought and the results achieved, thus preventing suits which are merely witch-hunts or fishing expeditions for constitutional violations. If no such relationship is required, then there is nothing to prevent the filing of groundless suits in order to search for any constitutional violation during discovery, whether related to the initial suit or not. Should a violation be found, the plaintiff can then become the prevailing party and recover attorney fees rather than pay them for the initial frivolous suit.

Concern over potential manipulation of claims for purposes of achieving attorney fees was voiced by Justice Powell in his dissent to the decision in *Maine v. Thiboutot*,[8] 448 U.S. 1, 100 S.Ct. 2502 (1980), where he stated:

> There is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where "civil rights" of any kind are at best an afterthought. In this case, for example,

[8]*Thiboutot* extended Sec. 1983 coverage to claims arising under the U.S. laws as well as the U.S. Constitution; specifically involved was the Social Security Act.

> the respondents added a §1983 count to their complaint some years after the action was initiated, apparently in response to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976....Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.

Maine, 448 U.S. at 22, 100 S.Ct. at 2514.

This is not the intent of the Act. It was designed to remove financial barriers to meritorious lawsuits rather than to spawn general civil rights litigation. This is evidenced by the Congressional mandate to not authorize fee awards to all civil rights plaintiffs but only to "prevailing" plaintiffs. Congress must have considered that easy accessibility to attorney's fees could have the negative impact of forcing overly generous settlements solely to avoid the impact of being assessed attorney fees that exceed the value of the issue litigated.

It is obvious that in the present case the Petitioners did not know that some of the GISD administrators held offending interpretations of Administrative Regulation 412. This had never been an issue and there was no pre-existing factual basis for a suit on these claims. Only through happenstance during discovery did this issue surface and even though Petitioners succeeded on this issue, they did not bring about any change in the schools' practices or procedures since the offending interpretation of Administrative Regulation 412 was never enforced nor were there any plans to so enforce it.

Sound judicial policy and legislative intent support the Fifth Circuit central issue standard to determine who is a prevailing party and the Fifth Circuit application of that standard to the present case.

III. ALL CIRCUITS REQUIRE A NEXUS BETWEEN THE RELIEF SOUGHT AND THE RESULTS ACHIEVED.

All of the circuits agree that in order to be a prevailing party and recover attorney's fees, there must be some degree of success on the issues or reasons involved in *bringing the suit*. The degree of success required varies between the circuits.

The First Circuit standard adopted in *Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978) requires "success on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit". This standard has been adopted verbatim by the Second, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. *Gingras v. Lloyd*, 740 F.2d 210, 212 (2nd Cir. 1984); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979); *Kreimes v Department of Treasury*, 764 F.2d 1186, 1188 (6th Cir. 1985); *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); *Fast v. School District of Ladue*, 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983); *In re Kansas Congressional Districts Reapportionment Cases, O'Sullivan v. Brier*, 745 F.2d 610, 612 (10th Cir. 1984).

The Third Circuit requires that the Plaintiff as prevailing party achieve "some of the benefit sought" by bringing the suit. *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910 (3rd Cir. 1985). The Federal Circuit requires that a prevailing party has "substantially prevailed in its position". *Austin v. Department of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984). The District of Columbia Circuit requires that the Plaintiff must have "substantially received the relief sought". *Miller v. Staats*, 706 F.2d 336, 341 (D.C. Cir. 1983). The Fifth Circuit requires that the Plaintiff

prevail on the "central issue by acquiring the primary relief sought". *Simien v. City of San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987). Finally, the Eleventh Circuit states that the prevailing party test is "whether he or she has received substantially the relief requested or has been successful on the central issue". *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

The variance between the different circuit requirements is not as "sharp" as Petitioners allege. Regardless of the degree of success required, whether "significant", "substantial", or "central", all of the circuits require a nexus between the relief obtained and the relief which the Plaintiff was seeking. Petitioners cannot establish this necessary relationship between what they sought and what they achieved and would not be a prevailing party in any of the circuits.

The Fourth Circuit (which has adopted the *Nadeau* standard) gave some guidance to a prevailing party analysis by stating:

> Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when *measured against the benchmark condition.* (emphasis added).

Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979).

Application of that analysis to the present case would establish union access to the school, teachers, and mail

system as the benchmark and the relief obtained would measure zero against the benchmark.

The Third Circuit analysis is derived from the *Bonnes* decision and states:

> To apply the prevailing party standard, it is important first to *identify the relief plaintiff sought* and, in relevant cases, the legal theories on which the relief was based. Usually a commonsense comparison between relief sought and relief obtained will be sufficient to indicate whether a party has prevailed. (emphasis added).

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 911 (3rd Cir. 1985).

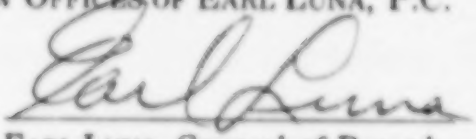
When viewed on the basis of the foregoing analytical approaches rather than the adopted labels of "substantial" or "significant", the Fifth Circuit "central issue" test requiring a Plaintiff to achieve the primary relief sought is really the same. The Fifth Circuit panel in this case correctly analyzed the case and held that Petitioners were not prevailing parties because they did not achieve access to GISD campuses. Their suit did not involve teacher communications. Try as hard as Petitioners will to establish that this was intended by their suit, they were not able to convince the district court or the court of appeals of this. Only through happenstance in discovery did Petitioners even become aware of this possible interpretation of Administrative Regulation 412. Petitioners lost on all issues which prompted this litigation. Prevailing party status in the Attorney's Fees Awards Act was intended to compensate a meritorious suit not to turn losing Plaintiffs into attorney's fees victors.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION, GARLAND EDUCATION ASSOCIATION, JOE ATKINS AND JANICE HILL,
Plaintiffs,

vs

GARLAND INDEPENDENT SCHOOL DISTRICT, THE BOARD OF TRUSTEES OF THE GARLAND INDEPENDENT SCHOOL DISTRICT, HARRIS HILL, R. E. DODSON, DARWIN MORRIS, DONALD SENTER, CASH BIRDWELL, JIM BURNS, JIM KENNEDY, in their official capacities as Trustees thereof, and ELI DOUGLAS, in his official capcity as Superintendent of the Garland Independent School District,
Defendants.

COMPLAINT AND JURY DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the Texas State Teachers Association, the Garland Education Association, Joe Atkins, and Janice Hill, by and through their undersigned attorneys, and file this, their original Complaint, and for cause of action would respectfully show the Court as follows:

I.

This is an action for legal and equitable relief, including damages, an injunction, declaratory judgment, attorneys' fees and costs. Jurisdiction is invoked pursuant to 42 U.S.C. Section 1983; pursuant to 28 U.S.C. Sections 1331 and 1343(3) and (4); and pursuant to 28 U.S.C. Sections 2201 and 2202; and pursuant to the Constitution of the United States, particularly the First and Fourteenth Amendments thereto. The amount in controversy in this cause exceeds Ten Thousand ($10,000.00) Dollars.

II.

A. Plaintiff Texas State Teachers Association is a duly organized, voluntary association here bringing suit on behalf of itself and on behalf of its members, which members would otherwise have standing to sue in their own rights. The interests the Association here seeks to protect are germane to the Association's purposes, and neither the claim asserted nor the relief requested requires the participation of all individual members in the lawsuit. The Texas State Teachers Association has, among its members, persons employed as teachers within and by the Garland Independent School District.

B. Plaintiff Garland Education Association is also a voluntary association comprising a membership of teachers employed by the Garland Independent School District. Said Garland Education Association is the local affiliate of the Texas State Teachers Association, and its members are also members of that statewide Association. The Garland Education Association has standing to bring this suit and does so on behalf of its members, inasmuch as its members would otherwise have standing to sue in their own rights. The interests it here seeks to protect are germane to the organization's purpose, and neither the claim asserted nor relief requested requires the participation of all individual members in the lawsuit.

C. Plaintiff Joe Atkins is an adult citizen of the United States and presently resides in the Northern District of

Texas. He is a member, employee, and representative of the Texas State Teachers Association.

D. Plaintiff Janice Hill is an adult citizen of the United States and presently resides in Garland, Texas, in the Northern District of Texas. She is the President of the Garland Education Association and is a member of the Texas State Teachers Association. She is also employed by and in the Garland Independent School District as a teacher.

E. Defendant Garland Independent School District is an independent school district organized pursuant to the laws of the State of Texas for the purpose of operating a system of public schools. The address of its administrative office is 720 Stadium Drive, Garland, Texas.

F. Defendants Harris Hill, R. E. Dodson, Darwin Morris, Donald Senter, Cash Birdwell, Jim Burns and Jim Kennedy are all members of the Defendant Board of Trustees of the Garland Independent School District and may be served with citation at the administrative offices of the Garland Independent School District at the above-mentioned address.

G. Defendant Board of Trustees of the Garland Independent School District, by virtue of the statutes of the State of Texas, is given and charged with the responsibility for the possession, care, control, and management of the affairs of the Defendant School District and has the same address as set out above. It may be served by serving its President, Mr. Harris Hill.

H. Defendant Eli Douglas is the Superintendent of the Defendant Garland Independent School District and may be served at his place of employment at the above-mentioned address.

III.

The Defendants have adopted and implemented policies and/or practices which are facially unconstitutional and/or unconstitutional as applied to Plaintiffs.

A. Specifically, Defendants have adopted and implemented a policy and/or practice which expressly forbids group meetings or individual conferences conducted by elected officials of any employee organization for purposes of membership recruitment or any other matter of business, on school premises during school hours.

B. Additionally, Defendants have implemented and engaged in the policy and practice of prohibiting all employees, representatives, and members of the Texas State Teachers Association from conferring or visiting with the teachers in the Garland Independent School District on school campuses during the school day for any purpose related to the employee organization. Defendants have specifically forbidden Plaintiff Atkins and all other representatives of Texas State Teachers Association from coming onto public school campuses in the Garland Independent School District between 8:00 A.M. and 3:45 P.M. in order to meet with teachers, even during the conference period of the teachers, regardless of whether such teachers were members or non-members of the Texas State Teachers Association, and regardless of the circumstances surrounding such proposed meetings.

Similarly, Defendants have forbidden its teacher employees, including those who are members of the Garland Education Association and the Texas State Teachers Association, from meeting or conferring with representatives of the Texas State Teachers Association, including but not limited to Plaintiff Atkins, on public school premises during such hours, including the conference periods of such teachers, and regardless of the circumstances surrounding such proposed meetings.

IV.

A. Plaintiffs say that said policies and practices, both as written and as applied to your Plaintiffs, are violative of the Plaintiffs' First Amendment rights of freedom of association and freedom of speech.

B. Plaintiffs say further that they have been denied their liberty interests in those First Amendment rights by virtue of such unconstitutional polices and practices, without due process.

C. Plaintiffs also say that said policies and practices have not been and are not being applied equally by the Defendants to all persons but are, rather, being applied so as to result in a deprivation of equal protection of the law to your Plaintiffs, all in violation of the Fourteenth Amendment to the Constitution of the United States.

D. Additionally, Plaintiffs say that said policies are so broad, vague, general and indefinite as to be unconstitutional as written and as applied. Specifically, Plaintiffs say that Defendants have failed to enact or adopt sufficient clear and precise standards susceptible of objective measurement by which to administer these written policies. Accordingly, such policies are unconstitutionally vague.

V.

A. Defendants have also adopted policies and practices which expressly prohibit Plaintiffs and the membership of the Plaintiff organizations from utilizing the school mail service, distributing material directly into mail boxes at a school, and disseminating information, whether verbal or written, on school property and/or by means of bulletin boards, public address systems and other school district equipment. Such policies and practices are unconstitutionally vague and broad and are an unlawful restraint on free expression and free association, in violation of the First Amendment to the Constitution of the United States. Moreover, said policies and practices lack sufficient clear and precise standards, susceptible of objective measurement, in their implementation by Defendant.

B. Furthermore, Defendants have applied said policies unequally and have, therefore, deprived your Plaintiffs of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VI.

Alternatively, assuming *arguendo* that the policies and practices described in paragraph III(A) above, are lawful, Defendants have nonetheless unlawfully and wrongfully excluded from the campuses of the Garland Independent School District the Texas State Teachers Association, its agents, representatives and employees, including but not limited to Joe Atkins, in violation of the Defendants' own such written and existing policies. Such wrongful exclusion has deprived all of your Plaintiffs of their right of free association and right of free speech, protected by the First Amendment to the Constitution of the United States, and has deprived all of your Plaintiffs of the property and/or liberty interest created by Defendants' own, existing written policies, all without due process.

VII.

Plaintiffs say that Defendants have allowed unfettered discretion to their administrative officials, without sufficiently explicit guidelines, in connection with implementation and application of the above-described policies and practices. As a result, the administration by Defendants of such policies has been and is arbitrary, capricious and inconsistent. Accordingly, such policies and practices, as implemented, are in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States, as well as 42 U.S.C. Section 1983.

VIII.

Plaintiffs say further that the policies and practices alleged and described above constitute a *per se* restriction of their exercise of First Amendment rights and that Defendants have wholly failed to provide a mechanism for appellate review, within a brief and reasonable time, of decisions applying and implementing those policies and practices. The failure of the Defendants' policies to provide such an appellate review mechanism is a violation of due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

IX.

As a direct and proximate result of the above-described unconstitutional conduct of the Defendants, Plaintiffs have been damaged as set out below, and are entitled to the following relief.

A. Plaintiffs say that they are entitled to recover at least nominal damages as a result of the Defendants' wrongful deprivation of due process, as alleged above.

B. Additionally, Plaintiffs here sue to recover their reasonable and necessary attorneys' fees pursuant to 42 U.S.C. Section 1988, and would show upon trial that such fees will be in the sum of $25,000.00 of which $10,000.00 should be credited if no appeal is taken from this Court's judgment.

C. Additionally, Plaintiffs here sue and respectfully ask this Court for an order declaring the above-described and alleged policies and practices to be violative of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. Section 1983, both on their faces and as they have been applied.

D. Additionally, Plaintiffs here sue and respectfully ask this Court to enter its order enjoining the Defendants, their agents, employees, assigns and successors in office, and any and all others actively participating with them, from applying or enforcing the policies and/or practices described hereinabove against the Plaintiffs or the members of Plaintiff organizations. Plaintiffs say in this regard that they are without an adequate remedy at law and that, unless said injunction issues, they will suffer irreparable harm.

X.

Plaintiffs say further that the above-described deprivations of a First Amendment right were committed by Defendants when Defendants knew or should have known that their conduct would violate such First Amendment rights of Plaintiffs. Plaintiffs say that such actions

constitute malice as a matter of law and, therefore entitle Plaintiffs to recover exemplary damages. Accordingly, Plaintiffs here sue to recover exemplary damages in a sum in excess of $10,000.00

XI.

Plaintiffs respectfully request trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court enter its judgment declaring the above-described policies and practices violative of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. Sec. 1983, both on their faces and as they have been applied; that this Court enter its order enjoining the Defendants, their agents, employees, assigns, successors in office, and any and all others actively participating with them, from applying or enforcing the above-described policies against the Plaintiffs or the members of Plaintiff organizations; that this Court enter its judgment entitling the Plaintiffs to recover of and from the Defendants, jointly and severally, Plaintiffs' nominal, actual, and exemplary damages, as alleged above, as well as Plaintiffs' reasonable and necessary attorneys' fees and costs of Court.

Plaintiffs pray for such other and further relief, both general and special, at law and in equity, to which they may show themselves justly entitled.

Respectively submitted,

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By _____
Frank Hill
State Bar No. 9632000

REPLY

BRIEF

FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY

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IN THE

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY

The Petition for a Writ of Certiorari ("Pet.") demonstrates that the "central issue" test of the Fifth and Eleventh Circuits conflicts with the definition of "prevailing party" that is applied in every other circuit (Pet. 8-11), as well as with this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (Pet. 12-15). Further, the central-issue test is contrary to congressional intent (Pet. 15-16), and requires the courts to engage in a complex inquiry that leads to unpredictable results and encourages litigation rather than settlement of fee disputes (Pet. 16-18).

Respondents' Brief in Opposition ("Opp.") is notable for its failure to respond at all to certain of these points,

and for the disingenuity of its response to the others. A brief reply is warranted.

I. THIS CASE PRESENTS A SHARP CIRCUIT CONFLICT: UNDER THE APPROACH FOLLOWED BY EVERY CIRCUIT EXCEPT THE FIFTH AND ELEVENTH, PETITIONERS WOULD HAVE BEEN ELIGIBLE FOR AN AWARD OF ATTORNEYS' FEES.

Respondents do not dispute our contention that the circuits are split as to the standard a plaintiff must satisfy to qualify as a "prevailing party." Respondents merely suggest that "[t]he variance between the different circuit requirements is not as 'sharp' as Petitioners allege," Opp. 18, because "[r]egardless of the degree of success required, whether 'significant,' 'substantial,' or 'central,' all of the circuits require a nexus between the relief obtained and the relief which the Plaintiff was seeking." *Id.* But to require a "nexus" in the form of success on "*the central* issue" in the litigation is to impose on a plaintiff a far more stringent burden than is imposed by the circuits which merely require success on "*any significant* issue." This conflict in the circuits is unambiguous and outcome-determinative; it means that civil rights plaintiffs in the Fifth and Eleventh Circuits will be denied attorneys' fees in circumstances where fees would be awarded in every other circuit.

This case is a perfect illustration of that point, and respondents' assertion that petitioners "would not be a prevailing party in any of the circuits" (Opp. 18) is simply wrong.

The court below, after acknowledging that the Fifth Circuit requires success on "the central issue" in the litigation while other circuits require success only on "any significant issue," 837 F.2d at 192 (App. 5a), held that petitioners were not prevailing parties under "[the Fifth Circuit's] definition," *id.* at 192 (App. 6a), because, al-

though petitioners "did succeed on significant secondary issues," they "did not succeed on the central issue. . . ." *Id.* at 193 (App. 6a). Thus the Court of Appeals as much as said that petitioners would have been entitled to fees under the approach followed by the other circuits. And that is plainly the case; for, as we have shown, the judgment petitioners received, which was so substantial as to prompt an appeal by respondents to this Court, unquestionably represented success on a "significant issue." See Pet. 5-6, 10.[1]

---

[1] At pages 5-6 of their opposition respondents seek to create the impression that petitioners won only a technical victory. Respondents' account grossly misstates the outcome of this case.

The Court of Appeals struck down GISD's policy as applied to "private teacher conversations and use of school media facilities by teachers employed in GISD schools. . . ." 777 F.2d at 1055-56 (App. 38a). With respect to "private teacher conversations," the Court of Appeals noted that respondents admitted that their policy prohibited teachers from "promoting" employee organizations—a prohibition which the court held to be flatly unconstitutional, 777 F.2d at 1054 (App. 34a-35a). The court further determined that respondents' policy actually extended so far as to prohibit "*any* discussions among teachers . . . relating to any teacher organization. . . ," even discussions that did not involve "promotion." 777 F.2d at 1053 (App. 32a) (emphasis by the court). Respondents' contention that the Court of Appeals' decision with respect to teacher conversations was based on a "hypothetical interpretation" of GISD's policy (Opp. 6) ignores the policy's *admitted* unconstitutional ban on speech "promoting" teacher organizations; and respondents' contention ignores, as well, the Court of Appeals' determination that the existence of GISD's broad ban on speech concerning employee organizations "chill[ed] teacher speech in violation of [the teachers'] First Amendment rights." 777 F.2d at 1055 (App. 36a). Thus the Court of Appeals' decision striking down GISD's policy as applied to teacher conversations represented a clear and important victory for petitioners.

The same is true of the Court of Appeals' ruling invalidating GISD's prohibition on the use by teachers of the school mail facilities and bulletin boards for communications regarding employee organizations. 777 F.2d at 1055 (App. 37a). Respondents state that carriage of *any* teacher mail by the schools is now prohibited by this Court's construction of the Private Express Statutes in

Respondents' contention that petitioners "would not be a prevailing party in any of the circuits" rests on the assertion that the claims as to which petitioners achieved success, involving the right of GISD teachers to communicate on the subject of employee organizations, were not pleaded in the complaint, but arose only in the course of discovery. See Opp. 7, 16, 18-19. Indeed, respondents go so far as to proclaim that "th[is] suit did not involve teacher communications" at all. Opp. 19. The Court of Appeals, however, did not suggest that the claims on which petitioners prevailed were somehow "not involve[d]" in the suit, or that they had arisen too late in the litigation to provide a basis for fees. Rather, the court simply held that these claims were not "the central issue" in the case. 837 F.2d at 193 (App. 6a.)

In fact, the court below, far from *relying* on any notion that the claims on which petitioners prevailed had not been pleaded in the complaint, did not even *mention* such a contention—and with good reason. In the first place, the claims *were* asserted in the complaint,[2] and they received substantial attention from the outset of the case in discovery. See 777 F.2d at 1053-55 and nn. 9, 14 (App. 32a-37a) (discussing some of the deposition testimony on this subject). But more to the point, respondents are unable to point to a single case in which any court has held that attorneys' fees should be denied because the claim on which the plaintiff prevailed was not initially pleaded, but arose during discovery. Such a view would make no sense: under the Civil Rights Attorney's Fees Awards Act, fees are to be awarded when a plaintiff "vindicate[s] . . . important Congressional policies," *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 2696 (1986) (plurality opinion) (see Pet. 10-11), and there is no basis for concluding that Congress wished to limit that principle to claims asserted in an initial complaint, as distinguished from constitutional violations that come to light during discovery.

In sum, respondents' effort to harmonize the decision below with the views of the other circuits is unavailing. The Court of Appeals' decision cannot be defended as respondents suggest, because the legal theory propounded by respondents is indefensible and, in any event, played no part in the Court of Appeals' decision.

Regents of the University of California v. Public Employee Relations Board, —— U.S. ——, 108 S.Ct. 1404 (1988). We disagree with that contention, which has never been asserted, much less adjudicated, with respect to the GISD mail service. But in all events, respondents' contention relates only to the carriage of mail, not the use of bulletin boards or the access by teachers to school mailboxes; and even as to the mail service itself, nothing that GISD may now assert regarding *University of California* can change the fact that petitioners prevailed in this litigation on the only issue presented regarding the mail service—namely, GISD's policy of allowing use of that service for all communications except those on the subject of teacher organizations. Petitioners achieved a clear victory when the Court of Appeals struck down that policy in 1985.

[2] Paragraph V(A) of the Complaint, reproduced in the appendix to the Brief in Opposition at A-5, states as follows:

> Defendants have also adopted policies and practices which expressly prohibit *Plaintiffs and the membership of the Plaintiff organizations from utilizing the school mail service, distributing material directly into mail boxes at a school, and disseminating information, whether verbal or written*, on school property and/or by means of bulletin boards, public address systems and other school district equipment (emphasis added).

Since the plaintiffs included Janice Hill, a GISD teacher, and "the membership of the Plaintiff organizations" includes other GISD teachers, this paragraph of the complaint clearly alleged the unconstitutionality of the policy of forbidding communication among GISD teachers on the subject of employee organizations. So, too, paragraph III of the complaint refers to "members" and "representatives" of the plaintiff organizations, again including GISD teachers.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HENSLEY V. ECKERHART*.

Respondents maintain that this Court's discussion of the definition of "prevailing party" in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), did not resolve the issue presented here. As we acknowledged in the Petition, the question whether that passage in *Hensley* should be interpreted as resolving this issue is itself a matter on which the courts of appeals have split. See Pet. 13. However, following the passage in *Hensley* to which respondents refer, this Court went on to consider how the factor of "results obtained" should be dealt with in resolving a fee application; and as we have demonstrated, the Court's analysis of that subject cannot be reconciled with the central-issue test. Pet. 13-15. The Brief in Opposition conspicuously ignores this point.

III. THE DECISION BELOW IS CONTRARY TO CONGRESSIONAL INTENT.

In response to our showing that the central-issue test cannot be reconciled with Congress' purpose in enacting the Civil Rights Attorney's Fees Awards Act (Pet. 15-16), respondents make much of the fact that a committee report accompanying the legislation cited a district court decision, *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), which contained the words "central issue." Opp. 13-15. But the report cited *Parker* only for the following proposition:

> The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

H.R. Rep. No. 94-1558, p. 7 (1976).

That passage obviously cannot be read to reflect any congressional determination that fees should be awarded only where a plaintiff has prevailed on the "central issue"—a limitation that is nowhere suggested in the report.[8]

IV. THE APPROACH OF THE FIFTH AND ELEVENTH CIRCUITS GUARANTEES UNPREDICTABLE RESULTS, PROTRACTED FEE LITIGATION, AND FEWER SETTLEMENTS OF FEE DISPUTES.

The central-issue test leads to unpredictable results which turn largely on semantics and on a speculative assessment of the parties' subjective aims, thereby encouraging protracted fee litigation and discouraging settlements of fee disputes. Pet. 16-19. The Brief in Opposition offers no response to this point. It is therefore

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[8] Indeed, *Parker v. Matthews* itself cannot fairly be read to support the central-issue test as adopted by the Fifth and Eleventh Circuits. The *Parker* court stated that "a party who settles his or her Title VII lawsuit may be a 'prevailing party' under the statute . . . [to] be determined by . . . [factors including] whether the party is the successful party with respect to the central issue—discrimination." 411 F. Supp. at 1064. By defining the "central issue" in a Title VII suit as "discrimination," the *Parker* court simply indicated that a plaintiff who settles his case may be deemed to have prevailed only if he was successful on some claim *arising under the statute*. In that sense of the term, just as the plaintiff in *Parker* prevailed on the central issue of "discrimination," petitioners here prevailed on the central issue of "freedom of speech." The Fifth Circuit, however, uses the term "central issue" in a much narrower sense, as the present case illustrates. Thus, even if Congress could be said to have endorsed every word in *Parker*, this would not constitute congressional approval of the Fifth Circuit's narrow definition of "prevailing party."

clear that the central-issue test, as applied by the Fifth and Eleventh Circuits and as exemplified by the decision below, is fundamentally at odds with this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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CERTIORARI GRANTED OCTOBER 3, 1988

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Note: The following materials are reproduced in the Appendix to the Petition for a Writ of Certiorari:

Opinions Below

Appendix A—Opinion of the Court of Appeals dated February 8, 1988, 837 F.2d 190	Pet. App. 1a
Appendix B—Memorandum Opinion and Order of the District Court dated March 3, 1987	Pet. App. 16a

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Appendix C—Opinion of the Court of Appeals dated December 6, 1985, 777 F.2d 1046 ..... Pet. App. 21a

Appendix D—Order of Summary Affirmance dated October 6, 1986, 479 U.S. 801 ..... Pet. App. 39a

Appendix E—Memorandum Opinion and Order of the District Court dated August 24, 1984 ..... Pet. App. 40a

Judgment Sought to be Reviewed

Appendix F—Judgment of the Court of Appeals dated February 8, 1988 ..... Pet. App. 61a

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
District Court	
1981	
Mar 13	Filed COMPLAINT AND JURY DEMAND . . . Issued Summons.
Apr 6	Filed *ANSWER* OF DEFENDANTS.
July 29	Filed ORAL DEPOSITION OF JOE LOUIS ATKINS.
Sep 14	Filed ORAL DEPOSITION OF JANICE HILL.
Oct 23	Filed ORAL DEPOSITION OF ESPERANZA CARRILLO.
Oct 23	Filed ORAL DEPOSITION OF HERBERT V. COOKE, JR.
Oct 23	Filed ORAL DEPOSITION OF BRUCE KUEMMEL.
Oct 23	Filed ORAL DEPOSITION OF CARMEN GAUME.
1982	
Jan 7	Filed ORAL DEPOSITION OF BILL HARDY.
Jan 7	Filed ORAL DEPOSITION OF W.C. NIX.
May 3	Filed PLTFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.
May 3	Filed MEMORANDUM OF LAW IN SUPPORT OF PLTFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.
Jun 10	Filed DEPOSITION OF AL BRANK.
Jun 10	Filed DEPOSITION OF MICHAEL RICHEY.
Jun 15	Filed ORAL DEPOSITION OF CHARLES WHITE.
Jun 15	Filed ORAL DEPOSITION OF ELI DOUGLAS, ED. D.

DATE	PROCEEDINGS
Jun 15	Filed HARRY BEAVERS.
Jun 15	Filed ORAL DEPOSITION OF EDGAR COLLINS, JR.
Jun 15	Filed MARVIN RODEN.
Jun 15	Filed DEFTS' MOTION FOR SUMMARY JUDGMENT.
Jun 15	Filed DEFTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT.
Jun 15	Filed DEFTS' BRIEF IN RESPONSE TO PLTFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.
Jun 16	Filed DEPOSITION OF MARJORIE WALL.
Jun 16	Filed DEPOSITION OF DON DORSETT.
Jun 16	Filed DEPOSITION OF JAMES BUTLER.
1984	
Aug 24	Filed MEMORANDUM OPINION AND ORDER . . . For the reasons discussed, the Plaintiff's Motion for Summary Judgment is DENIED, with exception that the stated portions of Adm. Reg. 412(4) and (5) are unconstitutionally overbroad. With the same exception, the defendants' Motion for Summary Judgment is GRANTED. Since the plaintiffs are not "prevailing parties" under 42 U.S.C. § 1988, 26 [sic] and since their suite [sic] was certainly not frivolous or brought in bad faith, neither side is entitled to an award of attorneys fees. Costs, however, are taxed against the plaintiffs.
Sept 18	Filed Pltfs' NOTICE OF APPEAL from the memorandum opinion and order entered August 24, 1984.

DATE	PROCEEDINGS
Court of Appeals (No. 84-1833)	
1984	
Sept 18	Notice of Appeal filed.
1985	
Dec 6	Opinion Rendered.
Dec 20	Appellees' Petition for Rehearing filed.
Dec 20	Appellees' Suggestion for Rehearing En Banc filed.
1986	
Feb 21	Order Denying Rehearing, w/o poll.
Mar 3	Jdgt. as Mdt. Issd to Clerk.
Mar 11	Appellees' Motion for Stay of Enforcement and/or Recall of Mandate filed.
Mar 14	Appellants' Opposition to Motion for Stay of Enforcement and/or Recall of Mandate filed.
Mar 26	Order denying Motion for Stay of Enforcement and/or Recall of Mandate.
District Court	
1986	
Mar 5	JUDGMENT, cc f/the USCA, issued as and for the mandate: ". . . the judgment of the district court in this cause is affirmed in part and reversed in part, and the cause is remanded to the district court for further proceedings in accordance with the opinion of this court. It is further ordered that each party bears its owns costs on appeal.
Supreme Court (No. 85-1890)	
1986	
May 17	Statement as to Jurisdiction filed.

DATE	PROCEEDINGS
May 17	Application for Stay filed (A-888), and order denying same by White, J., on May 19, 1986.
July 18	Brief of appellee TX State Teachers Assn., et al. in opposition filed.
Oct 6	Judgment AFFIRMED. The Chief Justice and Justice White would note probable jurisdiction and set the case for oral argument. Justice Scalia OUT.
Nov 7	Judgment issued.

District Court

1986

Dec 30	PLAINTIFFS' MOTION WITH SUPPORTING BRIEF AND AFFIDAVITS FOR AWARD OF ATTY FEES.
Dec 30	DECLARATION OF JEREMIAH A. COLLINS IN SUPPORT OF PLTFS' APPLICATION FOR AWARD OF ATTYS' FEES.

1987

Feb 9	DEFT.'S RESPONSE TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY'S FEES.
Mar 3	MEMORANDUM OPINION AND ORDER: . . . For reasons stated in Order, Ordered that Pltfs' motion for attys.' fees be DENIED.
Mar 30	NOTICE OF APPEAL by Pltfs. from Memorandum Opinion and Order of 3-3-87.

Court of Appeals (No. 87-1221)

1987

Mar 30	Notice of Appeal filed.
Oct 22	Flg. Motion of appellants for the Court to take judicial notice of certain pleadings, briefs and orders filed in earlier stages of the proceedings in this case.

DATE	PROCEEDINGS
Oct 29	Flg. order CARRYING W/THE CASE appellants' mot. to take judicial notice of certain pleadings, briefs & orders, in detail.

1988

Feb 8	Opinion Rendered.
Feb 8	Flg. & Entg. Judgment.
Mar 1	Judgt. as Mdt. Issd. to Clerk.

District Court

1988

Mar 4	JUDGMENT Issued as Mandate March 1, 1988 from USCA5, "ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed. It is FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS AND JANICE HILL,
Plaintiffs,

vs

GARLAND INDEPENDENT SCHOOL DISTRICT, THE BOARD OF TRUSTEES OF THE GARLAND INDEPENDENT SCHOOL DISTRICT, HARRIS HILL, R. E. DODSON, DARWIN MORRIS, DONALD SENTER, CASH BIRDWELL, JIM BURNS, JIM KENNEDY, in their official capacities as Trustees thereof, and ELI DOUGLAS, in his official capacity as Superintendent of the Garland Independent School District,

Defendants.

COMPLAINT AND JURY DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the Texas State Teachers Association, the Garland Education Association, Joe Atkins, and Janice Hill, by and through their undersigned attorneys, and file this, their original Complaint, and for cause of action would respectfully show the Court as follows:

I.

This is an action for legal and equitable relief, including damages, an injunction, declaratory judgment, attorneys' fees and costs. Jurisdiction is invoked pursuant to 42 U.S.C. Section 1983; pursuant to 28 U.S.C. Sections 1331 and 1343(3) and (4); and pursuant to 28 U.S.C. Sections 2201 and 2202; and pursuant to the Constitution of the United States, particularly the First and Fourteenth Amendments thereto. The amount in controversy in this cause exceeds Ten Thousand ($10,000.00) Dollars.

II.

A. Plaintiff Texas State Teachers Association is a duly organized, voluntary association here bringing suit on behalf of itself and on behalf of its members, which members would otherwise have standing to sue in their own rights. The interests the Association here seeks to protect are germane to the Association's purposes, and neither the claim asserted nor the relief requested requires the participation of all individual members in the lawsuit. The Texas State Teachers Association has, among its members, persons employed as teachers within and by the Garland Independent School District.

B. Plaintiff Garland Education Association is also a voluntary association comprising a membership of teachers employed by the Garland Independent School District. Said Garland Education Association is the local affiliate of the Texas State Teachers Association, and its members are also members of that statewide Association. The Garland Education Association has standing to bring this suit and does so on behalf of its members, inasmuch as its members would otherwise have standing to sue in their own rights. The interests it here seeks to protect are germane to the organization's purpose, and neither the claim asserted nor relief requested requires the participation of all individual members in the lawsuit.

C. Plaintiff Joe Atkins is an adult citizen of the United States and presently resides in the Northern District of Texas. He is a member, employee, and representative of the Texas State Teachers Association.

D. Plaintiff Janice Hill is an adult citizen of the United States and presently resides in Garland, Texas, in the Northern District of Texas. She is the President of the Garland Education Association and is a member of the Texas State Teachers Association. She is also employed by and in the Garland Independent School District as a teacher.

E. Defendant Garland Independent School District is an independent school district organized pursuant to the laws of the State of Texas for the purpose of operating a system of public schools. The address of its administrative office is 720 Stadium Drive, Garland, Texas.

F. Defendants Harris Hill, R. E. Dodson, Darwin Morris, Donald Senter, Cash Birdwell, Jim Burns and Jim Kennedy are all members of the Defendant Board of Trustees of the Garland Independent School District and may be served with citation at the administrative offices of the Garland Independent School District at the above-mentioned address.

G. Defendant Board of Trustees of the Garland Independent School District, by virtue of the statutes of the State of Texas, is given and charged with the responsibility for the possession, care, control, and management of the affairs of the Defendant School District and has the same address as set out above. It may be served by serving its President, Mr. Harris Hill.

H. Defendant Eli Douglas is the Superintendent of the Defendant Garland Independent School District and may be served at his place of employment at the above-mentioned address.

III.

The Defendants have adopted and implemented policies and/or practices which are facially unconstitutional and/or unconstitutional as applied to Plaintiffs.

A. Specifically, Defendants have adopted and implemented a policy and/or practice which expressly forbids group meetings or individual conferences conducted by elected officials of any employee organization for purposes of membership recruitment or any other matter of business, on school premises during school hours.

B. Additionally, Defendants have implemented and engaged in the policy and practice of prohibiting all employees, representatives, and members of the Texas State Teachers Association from conferring or visiting with the teachers in the Garland Independent School District on school campuses during the school day for any purpose related to the employee organization. Defendants have specifically forbidden Plaintiff Atkins and all other representatives of Texas State Teachers Association from coming onto public school campuses in the Garland Independent School District between 8:00 A.M. and 3:45 P.M. in order to meet with teachers, even during the conference period of the teachers, regardless of whether such teachers were members or non-members of the Texas State Teachers Association, and regardless of the circumstances surrounding such proposed meetings.

Similarly, Defendants have forbidden its teacher employees, including those who are members of the Garland Education Association and the Texas State Teachers Association, from meeting or conferring with representatives of the Texas State Teachers Association, including but not limited to Plaintiff Atkins, on public school premises during such hours, including the conference periods of such teachers, and regardless of the circumstances surrounding such proposed meetings.

IV.

A. Plaintiffs say that said policies and practices, both as written and as applied to your Plaintiffs, are violative of the Plaintiffs' First Amendment rights of freedom of association and freedom of speech.

B. Plaintiffs say further that they have been denied their liberty interests in those First Amendment rights by virtue of such unconstitutional policies and practices, without due process.

C. Plaintiffs also say that said policies and practices have not been and are not being applied equally by the Defendants to all persons but are, rather, being applied so as to result in a deprivation of equal protection of the law to your Plaintiffs, all in violation of the Fourteenth Amendment to the Constitution of the United States.

D. Additionally, Plaintiffs say that said policies are so broad, vague, general and indefinite as to be unconstitutional as written and as applied. Specifically, Plaintiffs say that Defendants have failed to enact or adopt sufficient clear and precise standards susceptible of objective measurement by which to administer these written policies. Accordingly, such policies are unconstitutionally vague.

V.

A. Defendants have also adopted policies and practices which expressly prohibit Plaintiffs and the membership of the Plaintiff organizations from utilizing the school mail service, distributing material directly into mail boxes at a school, and disseminating information, whether verbal or written, on school property and/or by means of bulletin boards, public address systems and other school district equipment. Such policies and practices are unconstitutionally vague and broad and are an unlawful restraint on free expression and free association, in violation of the First Amendment to the Constitution of the United States.

Moreover, said policies and practices lack sufficient clear and precise standards, susceptible of objective measurement, in their implementation by Defendant.

B. Furthermore, Defendants have applied said policies unequally and have, therefore, deprived your Plaintiffs of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VI.

Alternatively, assuming *arguendo* that the policies and practices described in paragraph III(A) above, are lawful, Defendants have nonetheless unlawfully and wrongfully excluded from the campuses of the Garland Independent School District the Texas State Teachers Association, its agents, representatives and employees, including but not limited to Joe Atkins, in violation of the Defendants' own such written and existing policies. Such wrongful exclusion has deprived all of your Plaintiffs of their right of free association and right of free speech, protected by the First Amendment to the Constitution of the United States, and has deprived all of your Plaintiffs of the property and/or liberty interest created by Defendants' own, existing written policies, all without due process.

VII.

Plaintiffs say that Defendants have allowed unfettered discretion to their administrative officials, without sufficiently explicit guidelines, in connection with implementation and application of the above-described policies and practices. As a result, the administration by Defendants of such policies has been and is arbitrary, capricious, and inconsistent. Accordingly, such policies and practices, as implemented, are in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States, as well as 42 U.S.C. Section 1983.

VIII.

Plaintiffs say further that the policies and practices alleged and described above constitute *per se* restriction of their exercise of First Amendment rights and that Defendants have wholly failed to provide a mechanism for appellate review, within a brief and reasonable time, of decisions applying and implementing those policies and practices. The failure of the Defendants' policies to provide such an appellate review mechanism is a violation of due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

IX.

As a direct and proximate result of the above-described unconstitutional conduct of the Defendants, Plaintiffs have been damaged as set out below, and are entitled to the following relief.

A. Plaintiffs say that they are entitled to recover at least nominal damages as a result of the Defendants' wrongful deprivation of due process, as alleged above.

B. Additionally, Plaintiffs here sue to recover their reasonable and necessary attorneys' fees pursuant to 42 U.S.C. Section 1988, and would show upon trial that such fees will be in the sum of $25,000.00 of which $10,000.00 should be credited if no appeal is taken from this Court's judgment.

C. Additionally, Plaintiffs here sue and respectfully ask this Court for an order declaring the above-described and alleged policies and practices to be violative of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. Section 1983, both on their faces and as they have been applied.

D. Additionally, Plaintiffs here sue and respectfully ask this Court to enter its order enjoining the Defendants, their agents, employees, assigns and successors in office,

and any and all others actively participating with them, from applying or enforcing the policies and/or practices described hereinabove against the Plaintiffs or the members of Plaintiff organizations. Plaintiffs say in this regard that they are without an adequate remedy at law and that, unless said injunction issues, they will suffer irreparable harm.

X.

Plaintiffs say further that the above-described deprivations of a First Amendment right were committed by Defendants when Defendants knew or should have known that their conduct would violate such First Amendment rights of Plaintiffs. Plaintiffs say that such actions constitute malice as a matter of law and, therefore entitle Plaintiffs to recover exemplary damages. Accordingly, Plaintiffs here sue to recover exemplary damages in a sum in excess of $10,000.00.

XI.

Plaintiffs respectfully request trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court enter its judgment declaring the above-described policies and practices violative of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. Sec. 1983, both on their faces and as they have been applied; that this Court enter its order enjoining the Defendants, their agents, employees, assigns, successors in office, and any and all others actively participating with them, from applying or enforcing the above-described policies against the Plaintiffs or the members of Plaintiff organizations; that this Court enter its judgment entitling the Plaintiffs to recover of and from the Defendants, jointly and severally, Plaintiffs' nominal, actual, and exemplary damages, as alleged above, as well as Plaintiffs' reasonable and necessary attorneys' fees and costs of Court.

Plaintiffs pray for such other and further relief, both general and special, at law and in equity, to which they may show themselves justly entitled.

Respectively submitted,

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By _____
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[Title Omitted in Printing]

[Filed Apr. 6, 1981]

ANSWER OF DEFENDANTS

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the Garland Independent School District, the Board of Trustees of the Garland Independent School District, Harris Hill, R. E. Dodson, Darwin Morris, Donald Senter, Cash Birdwell, Jim Burns, Jim Kennedy, in their official capacities as Trustees thereof, and Eli Douglas, in his official capacity as Superintendent of the Garland Independent School District, Defendants in the above entitled and numbered cause, and file this, their Answer to the Plaintiffs' Complaint, and for such would show the Court the following:

1.

The Court does not have subject matter jurisdiction of this cause of action.

2.

The Complaint fails to state a claim upon which relief can be granted.

3.

The defendants deny the allegations contained in paragraph II.A. of the Complaint, except for the last sentence of said paragraph II.A. which is admitted.

4.

The first two sentences of paragraph II.B. of said Complaint are admitted. The remainder of said paragraph II.B. is denied.

5.

The defendants have insufficient personal knowledge to either admit or deny the allegations contained in paragraph II.C. of said Compiaint but, on information and belief, will admit the allegations of said paragraph.

6.

The allegations contained in paragraph II.D, E, F, G and H of said Complaint are admitted.

7.

The allegations contained in paragraph III on page 3 of said Complaint are denied.

8.

The allegations contained in paragraph III.A and B of said Complaint are admitted.

9.

The allegations contained in paragraph IV A, B, C and D of said Complaint are denied.

10.

The allegations contained in paragraph V of said Complaint are denied.

11.

In connection with the first sentence of paragraph V.A of said Complaint, the defendants would show that while neither the plaintiffs' organizations nor any other organization, person or firm are permitted to utilize the facilities mentioned in paragraph V for non-school educational purposes, although the defendants do not have a membership list of said organizations, persons who are members of the organizations are regularly permitted

to use the facilities mentioned in said paragraph for the school's educational purposes.

12.

The allegations contained in paragraphs VI, VII, VIII, IX and X of Plaintiffs' Complaint are denied.

13.

The defendants deny that plaintiffs are entitled to the relief requested in their prayer.

14.

The defendants would show that their actions were appropriate, proper and legal and that they acted in a reasonable good faith fulfillment of their responsibilities and are immune from a suit for damages.

15.

The defendants would show that the school campuses of Garland Independent School District are not a public forum and, therefore, the plaintiffs do not have the right to exercise their rights of speech and association whenever and however they choose. The Constitution of the State of Texas, Article 7, Sec. 1, provides as follows:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Subsequent to the adoption of this Constitutional provision, the Legislature of the State of Texas passed Section 23.26 of the Texas Education Code which provides as follows:

"23.26 In General

(a) The trustees shall constitute a body corporate and in the name of the school district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.

(b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.

(c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office.

(d) The trustees may adopt such rules, regulations, and by-laws as they may deem proper."

Pursuant thereto, the Board of Trustees has adopted Statement of Policy No. 425, which provides as follows:

"RE: Soliciting, Selling, and/or Lottery

Solicitors, vendors, or salesmen shall not be permitted to confer with students or employees during school hours without prior approval of the administrator in charge.

Employees or students shall not be permitted to sell or promote any type of lottery or game of chance as a school activity."

Pursuant to the above mentioned policy, Administrative Regulation No. 425 has been issued by the administration, which provides as follows:

"RE: Soliciting, Selling, and/or Lottery

Solicitors, vendors, or salesmen shall not be permitted to confer with students or employees during school hours without prior approval of the administrator in charge.

Employees or students shall not be permitted to sell or promote any type of lottery or game of chance as a school activity."

16.

In connection with the Policy and Administrative Regulation the principals have been administratively instructed not to permit solicitations of the teachers during their class period or work period. The defendants are of the opinion that the school's academic climate should be maintained during the school day in order that the best interest of the education of all students may be served. However, the defendants have specifically provided, through administrative action, that the plaintiffs may meet with any teacher who cares to meet with them at any place on the school premises prior to the beginning of the school day at 8:00 A.M. and after the end of the school day. If the plaintiffs need a room for a meeting place, such is furnished to them for their convenience by the defendants. The defendants respectfully submit that this arrangement permits a reasonable alternative for the plaintiffs to exercise their First Amendment rights with the employees of the school system.

17.

The defendants have furnished a second alternative for the plaintiffs to communicate with the employees of the District and that is to furnish them with the names, addresses and telephone numbers of the school employees so that they may either visit the employees at their homes, correspond with them and send them material by mail, as well as verbal messages by telephone.

18.

The defendants furnish a third alternative to the plaintiffs to exercise their rights by permitting them to visit any building they choose before or after school and put

such of their written information as they choose on the desk of any or all teachers.

19.

The defendants would further show that permitting the plaintiffs to solicit and visit the teachers during the school day would be disruptive of the educational process and such disruption is not required by either the Constitution of the State of Texas or the United States. Not only is same not required by the Constitutions, the visitations and communications requested by the plaintiffs in this suit constitute unnecessary interruption of the school's business of providing educational efficiency, especially in view of the alternatives authorized by these defendants.

20.

The defendants both permit and encourage the plaintiffs to properly exercise their rights on school premises but respectfully submit that the rules adopted by the defendants constitute reasonable regulations on how, when and where such rights are to be exercised.

21.

These defendants would further show that as prevailing parties in this cause, they will be entitled to recover a reasonable attorney's fee under 42 U.S.C. § 1988 and they request the Court to assess such fees against the plaintiffs as a part of the costs in this cause.

WHEREFORE, these defendants respectfully pray that all relief sought by the plaintiffs be denied, that the cause be dismissed, and that these defendants be awarded court costs and attorney fees.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1833

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Plaintiffs-Appellants,

vs.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

EXCERPT FROM BRIEF FOR DEFENDANTS-APPELLEES

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* * * *

The teachers have been given limited access to these facilities. They may use them, *as teachers* for official school business or for personal messages. However, teachers at various times act in a number of different capacities, e.g., teacher, citizen or representative of an employee organization. It is when teachers are acting in the latter capacity that access to these facilities is denied. Denial of access is, therefore, not based upon the content

of their speech. Use of the facilities by teachers, acting as representatives of the organizations, would be letting the employee organizations accomplish through the back door what they cannot accomplish through the front door.

Appellants also claim "that Garland Independent School District's policy forbids teachers to discuss *anything* having to do with an employee organization." Appellants' Brief, p. 36 (emphasis by appellants). Some administrators may interpret the policy as Appellants so interpret, however, the majority of the administrators interpret the policy, and correctly, as allowing the casual mentioning or discussing of an organization, but not the promoting of an organization.[15]

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[15] Excerpts from the depositions in this regard are as follows:

Q: Now, if one of [the teachers] says ladies and gentlemen, I went to the TSTA meeting last night and there was a very interesting speaker there . . . as you understand the application of your policies, is she permitted to talk about that . . .?

A: Sure.

* * * *

Q: But if [a teacher] says, 'And I really encourage y'all all to come over and attend"?

A: . . . [S]he's violating the policy then. [Dep. I (Principal Brank), pp. 19, 22.]

Similarly, Principal White testified as follows:

Q: Well would you agree that technically a reading of Policy 412 would prohibit such a conversation [going to a meeting] in your judgment?

A: It would forbid promotion of a professional organization, yes. [Dep. K (Principal White), p. 37].

Similarly, Principal Collin testified as follows:

Q: . . . [W]ould it be a violation of your district's policies for four teachers at your school during their conference period and while they are drinking coffee to talk about what's coming up at the next TSTA meeting?

[Continued]

Appellants claim that the District Court erred in refusing to find Defendants' Adm. Reg. 412 policy unlawful on the ground that there had been no "attempt to enforce it." The court said in its memorandum and order that only *some* school officials interpret Garland Independent School District's policy as forbidding *all* conversations among teachers as to *anything* having to do with employee organizations, and in any event, there has not been any attempt by those who do interpret Adm. Reg. 412 as such to enforce such an interpretation. (R.E. p. 11, n. 13). The correct interpretation, that held by the majority of administrators, is that the policy does not prohibit conversations, only "promotions" of employee organizations during the school hours. There was no attempt by the minority to enforce their incorrect interpretation. The Court was, therefore, correct in sustaining the policies as constitutional.

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[15] [Continued]

A: I would say "no".

Q: Would it be a violation . . . at lunch to talk about what happened at the last TSTA meeting?

A: I would say "no".

Q: Would it be a violation of your policies for one of the teachers to say that she was going to encourage everybody to join TSTA?

A: To me that's the act of promoting, yes. [Dep. N (Principal Collins), pp. 21-22].

See also, Dep. J. (Principal Richey), p. 51 for similar testimony.

[Title Omitted in Printing]

MOTION FOR STAY OF ENFORCEMENT AND/OR RECALL OF MANDATE

TO THE HONORABLE COURT OF APPEALS:

Now come Appellees Garland Independent School District, et al., for whom the United States District Court for the Northern District of Texas, Dallas Division, Honorable Jerry L. Buchmeyer, Judge, entered a Judgment denying the plaintiffs-appellants relief. On appeal by the plaintiffs-appellants, the Fifth Circuit affirmed in part, reversed in part, and remanded in part. Pursuant to Rule 41, Fed. Rules of Appellate Procedure, and Rule 41.2, Local Rules of Procedure for the Fifth Circuit, Appellees respectfully move this Honorable Court to recall its mandate issued in this cause on or about March 3, 1986, and/or to stay the enforcement of same for a period of thirty days and, if there is filed with the Clerk of the Court a certificate of the Clerk of the Supreme Court of the United States that an appeal or a petition for Writ of Certiorari has been filed with the Supreme Court, the stay of enforcement and/or recall of the mandate shall continue until the final disposition of the case by the Supreme Court.

In support of which, Appellees Garland Independent School District, et al., would show the Court as follows:

I.

That on or about March 3, 1986, mandate was issued to the District Court whose judgment was affirmed in part, reversed in part and remanded in part.

II.

Appellees Garland Independent School District, et al., would show the Court that a great injustice will be done to the educational processes of the School District if the stay requested is not granted. Appellee Garland Independent School District is charged by law with the orderly operation of the School District for the education of its students. The failure to grant this motion would require the changing of policies and procedures and training sessions for employees on approximately fifty (50) campuses. Said action could be premature and will siphon off educational resources and time from educational endeavors. Action of the Supreme Court could cause additional or different procedures and educational efficiency justifies granting this motion.

III.

Appellees Garland Independent School District, et al., expect and intend, within the time allowed by 28 U.S.C. § 2101, to appeal the case to the Supreme Court of the United States or apply to the Supreme Court of the United States by a petition for review on Writ of Certiorari of the decision rendered by this Court in the instant case.

WHEREFORE, PREMISES CONSIDERED, Appellees Garland Independent School District, et al., respectfully pray that their motion to stay enforcement of the mandate in the instant case and/or recall of said mandate be granted for a period of thirty days and that, if within that period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that an appeal of the case or a petition for Writ of Certiorari has been filed with the Supreme Court, the stay of enforcement and/or the recall of the mandate granted shall continue until the final disposition of the case by the Supreme Court; and

for such other and further relief to which the Appellees, Garland Independent School District, et al., may be justly entitled.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-1890

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

EXCERPT FROM BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

• • • •

II. APPELLEES' COUNTERSTATEMENT OF THE QUESTIONS DISTORTS THE ISSUES IN THIS CASE

Appellants are not before this Court for a determination, as Appellees' questions suggest, of whether a teacher may make a mention of an employee organization in a personal note to another teacher which is placed in the mailbox. Appellants are before this Court seeking a determination of whether a school district may constitutionally restrict use of its mail facilities and prohibit access by all employee organizations to such facilities and whether it may enforce this regulation by prohibiting an off-campus organization representative or a teacher, who may also be an employee organization representative, from placing employee organization materials in the mail-

boxes. The only factual controversy on this issue which was presented to the district court involved a request by Appellee Hill, who was a teacher and an officer of an employee organization, to place TSTA notices and information in the mailboxes. Appellant Garland Independent School District refused the request pursuant to Administrative Regulation 412. (Rec. B, pp. 10, 11—Hill). The District Court found that the mail system, bulletin boards and public address system were for the distribution of official messages between administrators and teachers and the Fifth Circuit agreed. (Rec. L, p. 28—White); (Rec. pp. 383, 389, App. A-10, 16, B-18). But, since teachers also used the mail system for personal messages on occasion, the Fifth Circuit held that the Regulation could not be applied to the teachers when the teacher was distributing employee organization material. The logic would appear to be that an official employee organization document can be kept out of the mail system if the person requesting distribution is not a teacher—but, if a teacher wishes to distribute that *same document*, it somehow becomes a personal message from teacher to teacher rather than a communication from the employee organization to the teachers. This totally defeats the *Perry* holding.

Likewise, this appeal involves the question of the school districts' right to curtail employee organization activities during school hours. The issue presented for review is not the private conversations of the teachers, rather it is the teachers' representation of the employee organization and overt activities to carry out this representation during school hours. The subject matter of employee organization business does not change character based on who is making the presentation. Employee organization business does not become private and personal conversation when stated by a teacher representative rather than by an outside employee organization representation.

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PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1759

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF PETITIONERS

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30 pp

QUESTION PRESENTED

Is a plaintiff who obtains judgment in his favor on a significant issue in a civil rights lawsuit, but who does not prevail on what the court determines was the "central issue" in the litigation, a "prevailing party" for attorney's fees purposes under 42 U.S.C. § 1988?*

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* In addition to the parties named in the caption, the following parties were defendants-appellees in the court below: Eli Douglas, Superintendent of the Garland Independent School District; the Board of Trustees of the Garland Independent School District; and the members thereof, to wit, Harris Hill, Donald Senter, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M.D. Williams IV.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1759

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS and JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals affirming the district court's decision denying attorney's fees is reported at 837 F.2d 190 and is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at Pet. App. 1a-15a. The opinion of the district court denying attorney's fees is unreported and is reproduced at Pet. App. 16a-20a. The prior opinion of the Court of Appeals on the merits is reported at 777 F.2d 1046 and is reproduced at Pet. App. 21a-38a. This Court's order summarily affirming that decision is reported at 479 U.S. 801 and is reproduced at Pet. App. 39a. The decision of the district court on the merits is unreported and is reproduced at Pet. App. 40a-60a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1988 (Pet. App. 61a). The petition for a writ of certiorari was timely filed on April 25, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondent Garland Independent School District ("GISD"), a public school district in Texas, adopted a policy prohibiting communications by or with teachers during the school day concerning employee organizations.[1] "[This] policy, as expressed in Administrative Regulation 412, affect[ed] two different classes of communications: (1) communications instigated by outside representatives of [employee organizations] who desire access to teachers and school communication facilities; and (2) communications among GISD teachers employed by the schools." *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046, 1050 (5th Cir. 1985), *aff'd mem.*, 479 U.S. 801 (1986) (*"Garland I"*) (Pet. App. 26a).

[1] The term "employee organization" was defined to include "any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures." Pet. App. 40a, n.1.

As applied to outside representatives, GISD's policy prohibited them from having access to school grounds during school hours, and from using school communication facilities for the dissemination of information concerning employee organizations. *Id.* at 1048-49 (Pet. App. 22a-24a). As applied to GISD's own teachers, respondents admitted that the policy prohibited a teacher from discussing employee organizations "if, in [the school officials'] view, such discussion amounted to 'promoting' the organization," *id.* at 1054 (Pet. App. 34a); and the Court of Appeals observed that the prohibition in fact extended even further: "[t]he evidence indicates that school officials interpret Admin. Reg. 412 as prohibiting *any* discussions among teachers relating to . . . any teacher organization that occur on school premises during school hours, even though those discussions occur during lunch hour or other non-class time." *Id.* at 1053 (Pet. App. 32a) (emphasis by the court). GISD's policy also prohibited teachers from using the internal mail system and bulletin boards to communicate regarding employee organizations: "GISD allow[ed] teachers to [use these facilities] to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations." *Id.* at 1055 (Pet. App. 37a).

GISD's ban on speech concerning employee organizations, as applied both to outside representatives and to GISD teachers, was challenged by petitioners: Texas State Teachers Association ("TSTA"), a voluntary membership organization that is classified as an "employee organization" for purposes of GISD's policy; Garland Education Association ("GEA"), one of TSTA's local affiliates which is also considered an "employee organization;"[2] Joe Atkins, an employee of TSTA; and Janice Hill, employed as a teacher by GISD and a mem-

[2] *See* Pet. App. 40a, n.1. TSTA and GEA sued on their own behalf and on behalf of their members. Joint Appendix ("App.") 7.

ber of TSTA and president of GEA. Their complaint, filed under 42 U.S.C. § 1983 against GISD, the members of GISD's Board of Trustees, and its Superintendent, alleged that GISD Administrative Regulation 412 ("Regulation") violated the First and Fourteenth Amendments.

The District Court granted summary judgment for respondents (Pet. App. 40a-60a), upholding the Regulation except in one respect not pertinent here (Pet. App. 58a). On appeal, the Fifth Circuit affirmed the District Court's decision as it pertained to outside representatives of employee organizations, 777 F.2d at 1050-53 (Pet. App. 27a-31a), but "reverse[d] that part of the summary judgment which uph[eld] Administrative Regulation 412's application to private teacher conversations and use of school media facilities by teachers employed in GISD schools. . . ." 777 F.2d at 1055-56 (Pet. App. 38a). The court "grant[ed] [petitioners'] motion for partial summary judgment holding the application of the Regulation to these activities unconstitutional." *Id.* at 1056 (Pet. App. 38a).

In its brief to the Fifth Circuit, GISD had emphatically urged the Court of Appeals to uphold the Regulation not only as applied to outside representatives, but as applied to the GISD teachers as well, asserting that if the Regulation were struck down with regard to the latter group, this "would be letting the employee organizations accomplish through the back door what they cannot accomplish through the front door." Brief for Defendants-Appellees at 39, *Garland I*, *supra* (App. 23). When the Court of Appeals reached precisely that result, respondents made every possible effort to overturn the decision. They filed a Petition for Rehearing and a Suggestion for Rehearing En Banc; and when the Petition and Suggestion were denied, 784 F.2d 1113 (5th Cir. 1986), respondents filed in the Court of Appeals a Motion for Stay of Enforcement and/or Recall of Mandate, asserting that "[t]he failure to grant this motion would

require the changing of policies and procedures and training sessions for employees on approximately fifty (50) campuses." Motion for Stay of Enforcement and/or Recall of Mandate at 2, *Garland I*, *supra* (App. 26). Petitioners filed an opposition to that Motion, and the Court of Appeals denied the Motion by order entered March 26, 1986. Respondents thereupon filed a motion in this Court for a stay, which was denied per order of Justice White. Respondents appealed the Fifth Circuit's judgment to this Court, and petitioners filed a Motion to Dismiss or Affirm. On October 6, 1986, this Court summarily affirmed the Court of Appeals' judgment, 479 U.S. 801 (Pet. App. 39a), thus finally putting an end to GISD's vigorous efforts to overturn that judgment.

Petitioners then moved in the District Court for an award of attorney's fees pursuant to 42 U.S.C. § 1988, but the court denied the fee request in its entirety. Although finding that petitioners had achieved "partial success," the District Court held that petitioners were not "prevailing parties" because they had not prevailed on "the central issue" in the litigation (Pet. App. 16a-20a). That issue, according to the District Court, was the constitutionality of the Regulation as applied to outside representatives of employee organizations.

A divided panel of the Court of Appeals affirmed the denial of fees. Noting that other Federal appellate courts have defined "prevailing parties" as those who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," 837 F.2d at 192 (Pet. App. 5a), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), and acknowledging that plaintiffs had "succeed[ed] on significant secondary issues," 837 F.2d at 193 (Pet. App. 6a), the Court of Appeals nonetheless declared that "[o]ur definition . . . is narrower. . . . We have held that the test for 'prevailing party' status as it applies to plaintiffs is 'whether the plaintiff prevailed on the central issue by acquiring

the primary relief sought.'" 837 F.2d at 192 (Pet. App. 5a), quoting *Simien v. City of San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987). The court affirmed the denial of fees on this basis, 837 F.2d at 192-93 (Pet. App. 6a):

> Applying this Court's definition of 'prevailing party' to the facts of this case, we agree with the conclusion of the district court that appellants did not succeed on the central issue of their suit and did not obtain the primary relief sought. The main thrust of this lawsuit was appellants' attempt to open up GISD school campuses during school hours to outside representatives of employee organizations like TSTA and GEA and to allow such organizations the use of school communication facilities. Appellants failed in this attempt, and this was the primary relief sought in this lawsuit. *Granted, appellants did succeed on significant secondary issues by having Regulation 412 declared unconstitutional as it applied to teacher to teacher conversation and teacher use of school communications systems. But this was not the primary relief sought.* The central issue in this case was employee organization access to GISD campuses, not internal teacher communication within those campuses. (Emphasis added.)

Judge Goldberg dissented, stating that "[b]y adhering to the law of this Circuit, the majority persists in an approach to the prevailing party standard that has been rejected by all but one of the other circuits, flies in the face of Supreme Court precedent and is inconsistent with the legislative purpose in enacting § 1988." *Id.* at 193 (Pet. App. 7a).

SUMMARY OF ARGUMENT

This Court's holdings preclude use of the "central issue" test to determine whether a plaintiff who obtains relief in a civil rights lawsuit is a "prevailing party" for attorney's fees purposes under 42 U.S.C. § 1988. As indicated in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the proper test for making that determination

is whether the plaintiff "succeed[ed] on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." (Part 1(a)). Under the approach carefully fashioned by this Court in *Hensley*, the degree of success obtained by a plaintiff who has prevailed on a significant issue goes not to the threshold question of whether the plaintiff is *eligible* for a fee award, but rather to determining the *amount* of that award. (Part 1(b)).

Only the Fifth and Eleventh Circuits continue to adhere to the central issue test to determine who is a prevailing party. All other circuits have adopted a test at least as generous as that initially articulated by the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (8th Cir. 1978), and approved by this Court in *Hensley*. In the view of these other circuits, success on (at most) "any significant issue" is sufficient to qualify a plaintiff as a prevailing party. (Part 2).

The latter test properly effectuates the intent of Congress in enacting the fee provision of § 1988. The determinative question insofar as the Congressional purposes are concerned is whether the plaintiff obtained relief that vindicates the policies of the Civil Rights Laws. Whether the plaintiff's success fell short of what he personally sought to achieve—*i.e.*, whether the issue on which he prevailed was the central issue of the lawsuit—has no relevance to that question. (Part 3).

The focus on whether the plaintiff achieved his central purpose not only misconstrues the intent of Congress, but requires the courts to inquire *post hoc* into the plaintiff's goals and motives in initially bringing the lawsuit. This is a complex and difficult inquiry, leading to unpredictable results and encouraging further litigation rather than the settlement of attorney's fees demands. The central issue test thus undermines compliance with this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley, supra*, 461 U.S. at 437. (Part 4).

ARGUMENT

A plaintiff who "prevails" in a civil rights action that is governed by 42 U.S.C. § 1988 [3] is eligible to recover "a reasonable attorney's fee as part of the costs"; and fees are to be awarded in such a case unless "special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (*per curiam*).[4] To qualify as a "prevailing party," a plaintiff must "receive at least some relief on the merits of his claim." *Hewitt v. Helms*, —— U.S. ——, 107 S.Ct. 2672, 2675 (1987). That is to say, it is not enough for a plaintiff to have been successful on some procedural point that does not go to the merits of his claim, *see Hanrahan v.*

[3] By its terms, § 1988 governs fee awards under 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986, as well as under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* This Court has observed that the attorney's fee provision in § 1988 "was patterned upon the attorney's fee provisions contained in Titles II and VII of the Civil Rights Act of 1964," 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983), quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980); and "[t]he legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'" *Hensley*, 461 U.S. at 433 n.7, quoting S. Rep. No. 94-1011, p. 4 (1976).

[4] See also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980):

> [The civil rights attorney's fee] provisions have been construed to treat plaintiffs and defendants somewhat differently. Prevailing plaintiffs in civil rights cases win fee awards unless "special circumstances would render such an award unjust," *Newman* . . ., [*supra*,] but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). This distinction advances the congressional purpose to encourage suits by victims of [civil rights violations] while deterring frivolous litigation.

Hampton, 446 U.S. 754 (1980); nor is it sufficient for the plaintiff to have obtained "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff," *Hewitt v. Helms*, *supra*, 107 S.Ct. at 2677. "[I]t seems clearly to have been the intent of Congress to permit . . . [a fee] award only to a party who has established his entitlement to some relief on the merits of his claims. . . ." *Hanrahan v. Hampton*, *supra*, 446 U.S. at 757.[5]

In this case petitioners plainly "established [their] entitlement to some relief on the merits of [their] claims," see pp. 4-5 *supra*; and if the matter on which petitioners were successful—namely, their attack on the constitutionality of respondents' policy as applied to GISD's own teachers—had been the only matter involved in this litigation, there would be no room for dispute as to petitioners' eligibility for an award of fees. The question presented is whether petitioners forfeited that eligibility, and are foreclosed from recovering any fee at all, because the matter as to which they achieved success was joined with *another* matter—namely, their attack on respondents' policy as applied to outside representatives of employee organizations—which, in the view of the courts below, constituted the "central issue" in the case, and as to which petitioners were not successful. As we will show, the decisions of this Court, the great weight of authority in the lower courts, the declared purposes of Congress, and interests of sound judicial administration all dictate that this question be answered in the negative.

1. This Court has on more than one occasion rendered decisions that would appear to preclude use of the "central issue" test to determine if a plaintiff is a "prevailing

[5] Such relief may take the form either of a litigated judgment or "voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances." *Hewitt v. Helms*, *supra*, 107 S.Ct. at 2676. See also *Maher v. Gagne*, 448 U.S. 122 (1980).

party" for attorney's fees purposes under 42 U.S.C. § 1988.[6] But the case that most squarely addresses—and in our view, is dispositive of—this issue is *Hensley v. Eckerhart, supra.*

In *Hensley* the Court sought to "clarify the proper relationship of the results obtained to an award of attorney's fees [under § 1988]." *Id.* at 432. To that end, the Court first addressed the definition of "prevailing party," and then proceeded to analyze the manner in which "the results obtained" should be taken into account in determining the *amount* of a reasonable fee. Both aspects of the Court's analysis are relevant here.

a) The Court's discussion of the definition of "prevailing party" was as follows, 461 U.S. at 433 (emphasis added):

> A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988.[7] The standard for making this threshold determination has been framed in various ways. *A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (CA 1 1978).*[8] *This is a generous formulation that brings the plaintiff only across the statutory threshold.* It remains for the district court to determine what fee is "reasonable."

[6] For example, in *Newman v. Piggie Park Enterprises, supra,* involving Title II of the Civil Rights Act of 1964, the Court held broadly that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402. The Court did not suggest that the injunction must address "the central issue" in the particular case if the plaintiff is to recover a fee. See also *Northcross v. Memphis Board of Education,* 412 U.S. 427, 428 (1973) (*per curiam*) (quoting *Newman, supra*); *Hanrahan v. Hampton, supra,* 446 U.S. at 757 (award of fees *pendente lite* may be considered whenever an order has "determine[d] substantial rights of the parties," and is "especially appropriate" if the plaintiff has prevailed on "an important matter in the course of litigation").

[8] See also *Busche v. Burkee,* 649 F.2d 509, 521 (CA 7 1981), *cert. denied,* 454 U.S. 897 (1981); *Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 897-898 (CA 9 1979) (*per curiam*). *Cf. Taylor v. Sterrett,* 640 F.2d 663, 669 (CA 5 1981). ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought").

Although the court below stated that the quoted passage in *Hensley* "merely accepted 'the generous formulation' of the 'prevailing party' definition found in some of the circuits but did not hold it to be the only correct definition," 837 F.2d at 192 (Pet. App. 5a-6a), we submit that the passage, even if it did not "prescribe one uniform articulation of the prevailing party standard," *see Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 911 (3d Cir. 1985), at least requires the rejection of any standard which is "patently inconsistent with the Court's 'typical' formulation." *Id. See also Hensley,* 461 U.S. at 441 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ., concurring in part and dissenting in part) ("I . . . agree [with the Court] that plaintiffs may receive attorney's fees for cases in which ' "they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." ' ") It seems clear that by characterizing the *Nadeau* test as "typical," and by recognizing that a "generous formulation" is appropriate where a plaintiff seeks only to cross the "statutory threshold" of eligibility for a fee, the Court left no room for the narrower approach followed by the Fifth Circuit. *See* M. Derfner and A. Wolf, *Court Awarded Attorney Fees* ¶ 8.03 at 8-18 (1988) ("Derfner and Wolf") ("*Hensley* absolutely necessitates a revision in the standard to which

only [the Fifth Circuit] and the Eleventh Circuit currently adhere," *i.e.*, the central issue test); M. Schwartz and J. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* 340 (1986) ("Schwartz and Kirklin") ("The conclusion . . . that the any significant issue prevailing party standard was in effect endorsed by the Supreme Court is sound.")[7]

b) But we need not rest our argument on a parsing of the single passage from *Hensley* just discussed, because

[7] Most of the lower courts have so understood the quoted passage in *Hensley*. *See, e.g., Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984) (*Hensley* "endorsed" *Nadeau*); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983) ("*Hensley* . . . held that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves *some* of the benefit which the parties sought in bringing suit' ") (emphasis by court of appeals); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1032 and n.2 (8th Cir. 1984) (*en banc*) ("The words and phrases selected by the Supreme Court to describe who is a 'prevailing party' are significant. A plaintiff is a prevailing party if he or she succeeds 'on *any* significant issue . . . which achieves *some* of the benefit the parties sought in bringing suit.' ") (emphasis by court of appeals); *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir. 1984).

The court below appears to have assumed that by characterizing the *Nadeau* formulation as "generous," this Court meant to suggest that individual circuits were free to adopt less "generous" tests. But the definition of the term "prevailing party" is a matter of statutory construction, not a matter left to the discretion of each circuit. What is more, even where discretion enters into the determination of whether fees should be awarded (*i.e.*, after the threshold "prevailing party" test has been satisfied), the parameters within which that discretion is to be exercised have been narrowly defined, and have not been left to vary from circuit to circuit. *See Newman v. Piggie Park Enterprises, supra. See also Hensley*, 461 U.S. at 437 (even in determining the *amount* of a fee, a district court's "discretion . . . must be exercised in light of the considerations we have identified"). Thus, if the *Nadeau* definition of "prevailing party" is a proper one, as *Hensley* plainly indicates, it cannot be that other circuits are free to adopt a markedly narrower definition.

the entire thrust of the Court's analysis in that case cannot be reconciled with the central issue test applied by the court below.

Hensley explicitly contemplates that plaintiffs who have achieved "only partial or limited success" will recover attorney's fees. *Id.* at 436. The fundamental point of the Court's analysis in *Hensley* regarding "the proper relationship of the results obtained to an award of attorney's fees," *id* at 432, is that the nature and extent of the "results obtained" can and should be taken into full account in determining the *amount* of the fee. An examination of the Court's discussion of that point will reveal that Judge Goldberg was correct in concluding in his dissent that "[u]nder *Hensley* the degree of success goes to the amount of an award, not the propriety of that award." 837 F.2d at 193 (Pet. App. 8a). We therefore examine at some length the Court's discussion of this matter.

"In *Hensley* . . . [the Court] held that 'the most critical factor' in determining a reasonable fee 'is the degree of success obtained.' " *Marek v. Chesny*, 473 U.S. 1, 11 (1985), quoting *Hensley*, 461 U.S. at 436. The Court explained that where a plaintiff "succeeded on only some of his claims for relief," *id.* at 434, this may affect the proper amount of the fee in two ways. First, "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." *Id.* In such a case, where "counsel's work on one claim [is] unrelated to his work on another claim . . . , no fee may be awarded for services on the unsuccessful claim." *Id.* at 435. Second, and more commonly,[8] where counsel's time was "devoted generally to the litigation as a whole, making it difficult to divide the hours expended in a claim-by-claim basis

[8] The Court observed that "[i]t may well be that cases involving such unrelated claims are unlikely to arise with great frequency." *Id.*

. . .[,] the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

The Court discussed in detail the proper mode of analysis in such a case:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. *See Davis v. County of Los Angeles*, *supra*, at 5049. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.
>
> Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether

> the expenditure of counsel's time was reasonable in relation to the success achieved. In this case, for example, the District Court's award of fees based on 2,557 hours worked may have been reasonable in light of the substantial relief obtained. But had respondents prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive, *see* n.1, *supra*, a fee award based on the claimed hours clearly would have been excessive.

Id. at 435-36 (footnote omitted).[9]

Significantly, the claim to which the Court referred in the final sentence of that discussion—"the claim that petitioners' visitation, mail, and telephone policies were overly restrictive"—was a relatively minor aspect of the *Hensley* litigation, and certainly could not be said to constitute the "central issue" in the case.[10] Yet the Court made it clear that if plaintiffs had prevailed on that single claim they would have been eligible for an award of attorney's fees (albeit one which did not provide compensation for all of the claimed hours).

Similarly, the Court's discussion in *Hensley* of the Eighth Circuit's decision in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978), clearly indicates that the plaintiff

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[9] The Court went on to explain that where an award based on the full number of hours would be excessive, "[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37.

[10] *Hensley* was a broad-based attack on conditions at a unit of a state hospital, involving (at the time of trial) six general areas: "physical environment; individual treatment plans; least restrictive environment [referring to delays in transferring patients from maximum-security confinement]; visitation, telephone and mail privileges; seclusion and restraint . . . [and] staffing." *Id.* at 427 and n.1. The question of visitation, mail and telephone policies was far from the primary focus of the litigation.

in *Brown* was entitled to a fee award even though she "had lost on the major issue" and had "obtained only a minor part of the relief she sought." *See* 461 U.S. at 438-39, n.14.

Thus, *Hensley* ensures that the level of success a plaintiff achieved will be properly considered in determining the *amount* of the fee to be awarded, so that "the district court [will] award only that amount of fees that is reasonable in relation to the results obtained," *id* at 440; and *Hensley* contemplates that this approach will be followed, and will result in a fee award of an appropriate amount, even in cases where plaintiff "lost on the major issue."

It is precisely for this reason that *Hensley* approved the view that a "generous formulation" should be applied in determining whether a plaintiff has achieved enough success to "[]cross the statutory threshold," *id.* at 433; for, as the Court emphasized, once a plaintiff has crossed that threshold "[i]t remains for the district court to determine what fee is 'reasonable,'" *id. Hensley* thus provides for a full and carefully calibrated consideration of the nature and extent of the plaintiff's success *after* the "prevailing party" threshold has been crossed.[11] To hold that a plaintiff who has "established his entitlement to some relief on the merits of his claims," *Hanrahan v. Hampton*, *supra*, 446 U.S. at 757, must be denied fees altogether if he did not succeed on "the central issue" would be to foreclose the district court from fashioning an "amount of fees that is reasonable in relation to the results obtained" (*Hensley*, 461 U.S. at 440) in such a case: it would require the district court to deny fees no matter how substantial the results obtained by the plaintiff, and no matter how reasonable the hours expended by counsel to achieve those results. This would be squarely at odds with the analysis in *Hensley*.

[11] *See* Derfner and Wolf, *supra*, ¶ 8.03 at 8-19 (*Hensley* "spelled out strict computation rules which [the Court] found necessary because of the ease with which one could become a prevailing party under [the *Nadeau* formulation approved by the Court]").

2. Only the Fifth Circuit and its offspring, the Eleventh Circuit, have embraced the central issue test;[12] and the Eleventh Circuit's adoption of the test reflects that court's policy of adhering to Fifth Circuit precedent that existed when the Eleventh Circuit was established, *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The other circuits have all adopted a formulation at least as generous as that which was initially articulated by the First Circuit in *Nadeau v. Helgemoe*, *supra*, 581 F.2d at 278-79, and quoted with approbation by this Court in *Hensley*, *supra*.

In addition to the First Circuit, nine other circuits have adopted verbatim the *Nadeau* test, under which plaintiffs qualify as prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *See Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979); *Kreimes v. Department of Treasury*, 764 F.2d 1186, 1188-90 (6th Cir. 1985); *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1032 (8th Cir. 1984) (*en banc*); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983); *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir. 1984); *Environmental Defense Fund v. Environmental Protection Agency*, 716 F.2d 915, 919 (D.C. Cir. 1983); *Austin v. Department of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984).[13] The Third Cir-

[12] *See Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (*en banc*). In some cases, however, panels of the Eleventh Circuit, with little or no discussion, have applied the "any significant issue" test, without even mentioning the "central issue" test. *See, e.g., Popham v. City of Kennesaw*, 820 F.2d 1570, 1578 n.3 (11th Cir. 1987); *Afro-American Patrolmen's League v. Atlanta*, 817 F.2d 719, 725 (11th Cir. 1987).

[13] *But see Kentucky Association for Retarded Citizens v. Conn*, 718 F.2d 182, 186-87 (6th Cir. 1983) (citing both the central issue

cuit has formulated essentially the same test in slightly different words: "[t]he standard used in this circuit for determining a plaintiff's prevailing party status is whether plaintiff achieved 'some of the benefit sought' by the party bringing the suit." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910 (3d Cir. 1985), quoting *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1167 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983). As the Third Circuit has noted, "the language of [its] standard is, in fact, a virtual quotation of a portion of *Nadeau*" and is "close[ly] similar[]" to the *Nadeau* formulation. *Institutionalized Juveniles*, *supra*, 758 F.2d at 911. Thus all of the circuits except the Fifth and Eleventh agree on the key principle that for a plaintiff to satisfy the threshold requirement of having "prevailed," he need not have achieved success on the 'central" issue. In the view of those circuits, success on (at most) "any significant issue" is sufficient to qualify the plaintiff as a prevailing party.

3. The latter approach, and not the central issue test, properly effectuates the intent of Congress. The fee provision of § 1988 is based on Congress' "'recogni[tion] that a plaintiff who obtains relief in a civil rights lawsuit "does so not for himself alone but also as 'a private attorney general,' vindicating a policy that Congress considered of the highest importance."'" *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality opinion), quoting H.R. Rep. No. 94-1558, p. 2 (1976). Congress has determined that "[f]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *City of Riverside*, *supra*, 477 U.S. at 578-79 (plurality opinion), quoting S. Rep. No. 94-1011, p. 2 (1976).

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and any significant issue tests and failing to distinguish between them); *BSA Inc. v. King County*, 804 F.2d 1104, 1112 (9th Cir. 1986) (reaching a result consistent with the central issue test, but failing to discuss the applicable test).

Thus, the interests that Congress recognized as warranting a fee award are present whenever a plaintiff "obtains relief in a civil rights lawsuit," *City of Riverside*, *supra*, 477 U.S. at 575 (plurality opinion), thereby "vindicat[ing] the important Congressional policies which these laws contain," *id.* at 579. When, as in this case, a plaintiff has accomplished that result, it is simply irrelevant, insofar as the legislative purposes are concerned, that the lawsuit also involved other claims as to which the plaintiff did not succeed.[14] Although the extent of the plaintiff's success is relevant in determining the *amount* of the fee, *see* pp. 13-16 *supra*, it would frustrate Congress' purposes to deny fees altogether to a plaintiff who has succeeded in obtaining some significant relief in a civil rights lawsuit.

Thus, as Judge Goldberg perceptively noted in his dissent, 837 F.2d at 196-97 (Pet. App. 15a), the central issue test loses sight of the question that is relevant to the legislative purposes (*i.e.*, whether the plaintiff obtained relief that vindicates the policies of the civil rights laws) and focuses instead on a question that has no such relevance, *i.e.*, whether the plaintiff's success fell short of what he personally sought to achieve:

> [T]he central issue standard places the focus of attention on the wrong issue. The goal of § 1988 was to make selflessness less expensive. The central issue test improperly focuses the court's attention on the selfish goals of the plaintiff. The central issue test requires an inquiry that is both difficult and irrelevant to the social function served by § 1988. The question that should be asked is whether a public right has been vindicated. If so, Congress requires

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[14] To be sure, there is also a legitimate Congressional purpose in "deterring frivolous litigation," *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980), but the central issue test is not designed to further that purpose, and, as the district court recognized, the claims on which petitioners did not prevail were "certainly not frivolous" (Pet. App. 60a).

an award of attorney's fees. The generous formulation of *Nadeau v. Helgemoe* properly focuses the attention of the factfinder on whether plaintiff has benefitted the public by serving as a private attorney general.

Although there is little in the legislative history of the Civil Rights Attorney's Fees Awards Act that addresses the degree of success a plaintiff must achieve to be eligible for a fee award, one passage in the Senate Committee Report is clearly germane. In discussing the award of fees *pendente lite*, the Report explains that such an award is "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues." S. Rep. No. 94-1011, *supra*, at 5, quoted in *Hanrahan v. Hampton*, *supra*, 446 U.S. at 757 (emphasis in original). If fees are appropriate *pendente lite* when a plaintiff has prevailed on an "important matter," surely fees should not be precluded when a plaintiff has received a *final judgment* in his favor on a civil rights claim, merely because the "important matter" on which he prevailed was not "the central issue."

4. The Fifth Circuit's focus on whether the plaintiff achieved his "central" purpose not only misconceives the relevant issue, but requires the courts to inquire *post hoc* into the plaintiff's goals and motives in initially bringing the lawsuit. This is a complex and difficult inquiry, leading to unpredictable results and encouraging further litigation rather than settlement of fee disputes.

For example, in this case, the courts below concluded that the litigation involved two issues, one concerning the application of GISD's policy to outside representatives of employee organizations and the other concerning the application of the policy to GISD teachers; and the courts proceeded on the view that only one of those two issues could qualify as "the central issue." But it could as easily be said that there was only one issue in this

case—namely, whether GISD could prohibit all communication concerning employee organizations during school time or using school facilities—and that petitioners prevailed on that issue.[18] Our point is not to argue which characterization is more apt, but to observe that the distinction between them turns largely on semantics, as well as on a speculative assessment of the parties' subjective aims. A civil rights plaintiff's entitlement to an award of attorney's fees should not turn on such nebulous considerations.

Even where there clearly are multiple issues in a lawsuit, the nature of the inquiry mandated by the central issue test "can be excruciating," Schwartz and Kirklin, *supra* at 348, and "[t]he application of the central-issue test guarantees increasingly protracted and complicated litigation over fees applications in an effort to distinguish centrality from significance." Judge Goldberg elaborated on this point in his dissent here, 837 F.2d at 196 (Pet. App. 14a-15a):

> The approach followed in [the Fifth] Circuit enhances the likelihood of protracted litigation over

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[18] Respondents themselves suggested such a unitary view of the issue when they complained that to invalidate the Regulation as applied to teachers "would be letting employee organizations accomplish through the back door what they cannot accomplish through the front door." *See* p. 4, *supra*. In the same vein, respondents declared that they should be allowed to limit speech concerning employee organizations whether the speech is "stated by a teacher representative . . . [or] by an outside employee organization representation [sic]," because "[t]he subject matter of employee organization business does not change character based on who is making the presentation." Brief Opposing Motion to Dismiss or Affirm at 5, *Garland Independent School District v. Texas State Teachers Ass'n*, 479 U.S. 801 (1986) (App. 29). Respondents characterized this as an aspect of "the school district's right to curtail employee organization activities during school hours"—a right which respondents viewed as equally applicable to speech by outside representatives and speech by GISD teachers. *Id.* at 4 (App. 29).

> attorneys' fees. The central issue approach requires a judicial assessment of plaintiff's goals. Such an inquiry is problematic. During the course of the litigation goals inevitably shift. As here, an issue of only minor importance in the original complaint rose to sufficient significance to inspire an appeal all the way to the Supreme Court. The approach followed in this Circuit forces the trial court to evaluate the post hoc recharacterization of the lawsuit to determine the central issue ex ante. This inquiry is inherently artificial, complex and time consuming.

See also Uviedo v. Steves Sash and Door Co., 760 F.2d 87, 89 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) (Rubin, J., dissenting from denial of rehearing *en banc*).

The litigation of centrality vs. significance was complicated enough in this case, where the District Court attempted to divine the central issue by "look[ing] to the number of lines in the complaint and the amount of time spent . . . proving the various issues," 837 F.2d at 194 (Pet. App. 9a) (Goldberg, J., dissenting). It will be even more complicated in cases where parties submit affidavits and other evidentiary materials in an effort to establish which issue was "the central [one]." [16] One thing is clear: in whatever manner the parties choose to proceed, the requirement of determining the "central issue" can only undermine compliance with this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. "Fee litigation occurs on a case to case basis and is often protracted, complicated and exhausting. There is little doubt that it should be simplified to the maximum extent possible." *Pennsylvania v. Delaware Valley Citizens' Council*, —— U.S. ——, 107 S. Ct. 3078, 3085 (1987). The central issue test hardly serves that end.[17]

[16] The central issue test invites such submissions because a party can never be sure that the court's parsing of the complaint and its assessment of the time devoted to various issues in the litigation will result in an accurate assessment of the importance and interrelationship of the various issues. (Petitioners, for example, certainly do not agree with the conclusions reached by the courts below as to the relative significance of the issues on which they were successful.) What is more, although for simplicity we have referred to the Fifth Circuit's approach as a "central issue" test, "[a]pplication of the central issue standard is further complicated by its dual requirements that the prevailing plaintiff both succeed on the central issue in the litigation and obtain the *primary relief* sought." Schwartz and Kirklin, *supra*, at 349-50 (emphasis added).

Furthermore, "[t]he uncertainties in the application of th[e central issue] standard invite the parties to litigate the prevailing party issue rather than settling the fee issue. . . ." Schwartz and Kirklin, *supra* at 351. There is virtually no incentive for a defendant not to litigate the question whether the plaintiff prevailed on the "central issue": if the defendant is successful on that question, he will not have to pay any fee, while if he is unsuccessful, he will have lost very little, because all of

[17] In contrast, as pointed out in Schwartz and Kirklin, *supra* at 342 (footnotes omitted):

> Under the simple and easily-administered any significant issue standard, the exercise of separately analyzing unrelated claims for prevailing party purposes becomes largely academic, since under that standard the plaintiff's success on any significant legal claim which "achieves some of the benefit" sought by the litigation establishes him as the prevailing party in the litigation as a whole. The any significant issue test thus avoids "semantic quibbles" over exactly how much success on which claim the plaintiff has to achieve in the litigation in order to cross the prevailing party threshold, and instead directs the attention of the parties and the district court to the task of determining the amount of a reasonable fee award. The any significant issue test thereby accords with the efforts at simplification of the § 1988 fee analysis intended by *Hensley v. Eckerhart*. At the same time, by discouraging the parties from resorting to litigation to resolve the prevailing party question, the generous any significant issue standard also facilitates out-of-court settlement of the fee matter, a result also encouraged by *Hensley*.

his arguments regarding the limited results obtained by the plaintiff can still be advanced as a basis for reducing the *amount* of the fee. With the stakes arrayed in that manner, defendants have every reason to litigate the "central issue" question in all but the most clear-cut cases.

For these reasons, rejection of the central issue test would not only effectuate the teaching of *Hensley* and the intent of Congress, but would greatly facilitate the resolution of attorney's fees disputes.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed, petitioners should be declared "prevailing parties" for attorney's fees purposes under 42 U.S.C. § 1988, and the case remanded for determination by the District Court of a reasonable attorney's fee.[18]

Respectfully submitted,

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[18] The question of the proper amount of the fee, including the question whether an adjustment is warranted in view of the degree of petitioners' success, is not before the Court and should be left for the District Court on remand. *See Hensley*, 461 U.S. at 432 n.6.

RESPONDENT'S

BRIEF

Supreme Court, U.S.
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NO. 87-1759

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

May Plaintiffs who did not prevail on the central issue of a civil rights suit and did not obtain the primary relief sought, recover attorneys' fees under 42 U.S.C. § 1988.

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NO. 87-1759

In The

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OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
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GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, issued its decision on the underlying merits of this case in its Memorandum Opinion and Order filed on August 24, 1984. The opinion is unpublished and is reprinted at Pet. App. p.40a.

The United States Court of Appeals for the Fifth Circuit issued its decision on the appeal of the underlying merits of the case on December 6, 1985. *Texas State Teachers Association, et al. v. Garland Independent School District, et al.*, 777

F.2d 1046 (5th Cir. 1985), reh. & reh. en banc den., 784 F.2d 1113 (5th Cir. 1986). The opinion is reprinted at Pet. App. p.21a.

This Court summarily affirmed the decision of the Court of Appeals on the underlying merits on October 6, 1986. *Garland Independent School District, et al. v. Texas State Teachers Association, et al.*, 479 U.S. 801, 107 S.Ct. 41 (1986). This Court's order is reprinted at Pet. App. p.39a.

The United States District Court for the Northern District of Texas denied attorneys' fees in this case in its Memorandum Opinion and Order filed March 3, 1987. The opinion is unpublished and is reprinted at Pet. App. p.16a.

The United States Court of Appeals for the Fifth Circuit affirmed the district court decision denying attorneys' fees on February 8, 1988. *Texas State Teachers Association, et al. v. Garland Independent School District, et al.*, 837 F.2d 190 (5th Cir. 1988). The opinion is reprinted at Pet. App. p.1a.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On March 31, 1981, the Petitioners[1] (hereinafter TSTA) filed a Complaint against the Respondents[2] (hereinafter GISD) seeking damages under 42 U.S.C. § 1983 and injunctive and declaratory relief alleging that GISD's policy regarding the district's relationship with employee organizations, as written and applied, violated their First and Fourteenth Amendment rights. (J.A. p.6). The allegations and acts complained of were specific and all involved union access to the teachers both in person and by mail. Petitioners complained of the school's prohibition against union representatives meeting with teachers on campus during school hours and from the prohibition of the unions' use of the school mail system, communication facilities and other district equipment. There were no other factual or legal allegations.

The Complaint contained no mention of any facts or allegations regarding teachers' private conversations with each other. Accordingly, the Answer of Defendants was limited to answering the Complaint and did not address this non-issue of teacher-to-teacher communications. (J.A. p.15).

The underlying facts which were the catalyst to this case are not in dispute. On January 8 and 9, 1981, nine TSTA representatives visited several GISD campuses but were refused permission to meet with the teachers or distribute their literature during school hours. *Texas State Teachers*

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[1]Petitioners were Plaintiffs and Appellants below, consisting of the Texas State Teachers Association (TSTA) and the Garland Education Association (GEA) which are affiliated teachers' unions and of Joe Atkins, a representative of TSTA, and Janice Hill, who was President of GEA, a member of TSTA and a teacher at the Garland Independent School District (R. pp. 191, 192).

[2]Respondents were Defendants and Appellees below, consisting of the Garland Independent School District (GISD), its Superintendent and the members of its Board of Trustees in their official capacities.

Association v. Garland Independent School District, 777 F.2d 1046 (5th Cir.). (Pet. App. p.24a). The school policy governing its actions is reflected in Administrative Regulation 412 which provides:

> RE: Professional Freedoms and Individual Rights
>
> The Garland Independent School District, its Board of Trustees, the Superintendent, assistant superintendents, principals, other administrators, and supervisors shall not directly or indirectly require, coerce, or unduly influence any employee of the District as respects:
>
> 1. joining, or not joining, any group, club, committee, organization, or association; or
> 2. participating in, or refraining from participating in, political affairs in the community, state, and nation.
>
> No District funds, vehicles, facilities (during scheduled school time or employee working time) shall be used in any manner in political activities; however, this policy does not prohibit the use of school facilities as voting places for elections during scheduled school time.
>
> Relationship with employee organizations[3] will be consistent with Article 21.904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.
> 3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.

[3]The parties have stipulated that TSTA and GEA are "employee organizations" within the meaning of Administrative Regulation 412 whose main purpose is to represent a group of employees in matters of employment practices and procedures. (Pet. App. p.2a, p.40a). TSTA and GEA also campaign for selected candidates and lobby on legislative issues. (R. vol. A, pp.48-51).

> 4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
> 5. Group meetings or individual conferences conducted by an elected official of any employee organization for purposes of membership recruitment or any other matter of business, shall not be conducted on school premises during school hours. School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
> 6. The school mail service shall not be used by any employee organization.
> 7. Distribution of material directly in mailboxes at the school is prohibited.
> 8. The use of school district equipment and supplies by any employee organization is prohibited.
> 9. The public address system is for school business only. Association announcements shall not be made on school equipment.

Extensive depositions were taken, including those of the Superintendent and several building principals. During the course of these depositions, several principals were asked their opinion about hypothetical applications of Administrative Regulation 412 to situations in which teachers were discussing union matters between themselves. Some felt that discussion of union business during school hours would be a "technical" violation but none had ever enforced such an interpretation. *Texas State Teachers Association v. Garland Independent School District*, CA3-81-0412-R, (Pet. App. p.46a), *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985). (Pet. App. pp.32a-36a).

The members of the Board of Trustees were never deposed in regard to this or any other issue. However, Dr. Eli Douglas, the Superintendent of Schools at that time, made the school district's official position on this issue quite clear:[4]

> Q. Do you have a policy or practice in the school district which prohibits two teachers who are sitting in the workroom drinking coffee which prohibits them from discussing TSTA?
>
> A. No.
>
> Q. Are they free to do that?
>
> A. Sure.
>
> Q. Does it matter whether they are members or non-members?
>
> A. Doesn't matter.
>
> Q. Do you have a policy that prohibits two teachers at lunch from talking about TSTA?
>
> A. No.
>
> Q. Do you have — and that doesn't matter whether they are members or non-members?
>
> A. Correct.
>
> Q. Do you have a policy that prohibits one teacher going into another teacher's room during the conference period when they both have a conference period and exchanging remarks about TSTA for five minutes?
>
> A. We have no procedure nor policy that prohibits that.
>
> Q. Again just be subject to reasonable practices I assume?
>
> A. Yes.

(Rec. L, p. 45 — Douglas.).

[4]This interpretation of the district policy by the Superintendent who is entrusted with its enforcement should not have been supplanted by the Fifth Circuit. *Board of Education v. McCluskey*, 458 U.S. 966, 970, 102 S.Ct. 3469, 3471 (1982).

Petitioners and Respondents each filed a Motion for Summary Judgment (R. vol. 1, p. 23; R. vol, 3, p. 1).

The issue of teachers' private communications emerges for the first time in Plaintiffs' Motion for Summary Judgment as:

> The deposition testimony of the Garland school principals and administrators demonstrates, however, that *it is entirely unclear* exactly what type of discussion among teachers would or would not violate Regulation 412, Paragraph 5. (emphasis added)

(Plaintiffs' Motion for Summary Judgment R. vol. 3, p. 13). Pinning the issue down any further was not possible since it existed in a factual vacuum where the Regulation had not ever been enforced or applied to teachers' private conversations.

The district court granted the Defendants' Motion for Summary Judgment, with a minor exception[5], upholding Administrative Regulation 412 as written and as applied, and denied the Plaintiffs' Motion for Summary Judgment disposing of Plaintiffs' teacher-to-teacher communications issue in a footnote to the opinion finding that "there has never been any attempt to enforce such an interpretation". *Texas State Teachers Association v. Garland Independent School District*, No. 3-81-0412-R. (Pet. App. p.46a). The Petitioners appealed.

The Fifth Circuit affirmed in part and reversed in part. All of the district court's decision dealing with outside union access to the school mail system and other communication facilities and to the teachers during school hours was upheld. The panel reviewed the evidence under the sum-

[5]The Defendants' Motion was granted in all respects except that the provision in Administrative Regulation 412 which provides for prior clearance from the principal for use of school facilities before or after school was held overbroad and vague.

mary judgment standard of the light most favorable to appellants, then disagreed with the district court's finding that "there has never been any attempt to enforce such an interpretation" and found there was evidence indicating that officials "might be inclined" to enforce their view of the policy against any speech mentioning TSTA. (Pet. App. pp.34a-35a). It also discussed that there was no evidence that officials would refrain from enforcing violations of which they became aware. The panel then held that "GISD policies which purport to deny teachers the right to discuss TSTA or TSTA business during non-class time are unconstitutional." (Pet. App. p.36a).

Hence, the Fifth Circuit decided a First Amendment issue which became germane to the case only through the irrelevant opinions of non-policy makers for the school. It is interesting to note that any action by the principals, based on their opinions, could not have resulted in 42 U.S.C. § 1983 damage liability to the district under this Court's recent decision of *City of St. Louis v. Praprotnik*, ___ U.S. ___, 108 S.Ct., 915 (1988).[8]

The Fifth Circuit also held that "GISD policies preventing teachers from using school mail facilities to mention 'employee organizations' are unconstitutional. So also are prohibitions against the use of whatever billboard facilities may be set aside for teachers' personal messages." (Pet. App. p.36a).

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[8]*City of St. Louis* adopted the criteria to determine what constitutes official policy, which was set forth in the plurality opinion of *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986). In Texas, § 23.26 of the Education Code vests the policy making authority in the Board of Trustees of the district. Section 21.913 of the Education Code sets forth the powers and duties of the principals who are administrators and not vested with policy making authority. Their administrative decisions are also subject to review by the Board of Trustees at the request of any aggrieved party. 19 Tex. Admin. Code § 61.231.

Respondents, in their appeal to this Court, were concerned that, while outside union access to the mail system was denied, the same could be achieved under the panel decision by simply handing the materials to a teacher who would then place same in the school mail for distribution to all other teachers as her "private communication". However, this issue was dispelled and resolved by this Court's subsequent decision in *Regents of the University of California v. Public Employment Relations Board*,___ U.S. ___, 108 S.Ct. 1404 (1988), which prohibits the use of the school's internal mail system for any purpose other than the school's official business.

Under these circumstances the district appealed and this Court summarily affirmed. *Garland Independent School District v. Texas State Teachers Association*, 479 U.S. 801, 107 S.Ct. 41 (1986). (Pet. App. p.39a).

Based on the foregoing portions of the panel decision, the Petitioners then filed their Plaintiffs' Motion with Supporting Brief and Affidavit for Award of Attorneys' Fees in which they claimed to be prevailing parties entitled to reimbursement for all time expended in the total amount of $64,724.82.

The district court held that Petitioners were not the prevailing party in the case, and, therefore, denied attorneys' fees. The court found that the issue on which the Petitioners succeeded was not the central issue of the case and was not sufficient to warrant prevailing party status. The Court stated:

> They did not prevail on claims relating to TSTA's use of school communication facilities — school mail service, bulletin boards, public address system or other school equipment. They did not succeed in achieving access by TSTA to teachers

during school hours, nor did they succeed on claims relating to other forms of distributing literature to teachers during school hours.

It is clear, not only from the background of the lawsuit, but also the claims as presented by Plaintiffs, that their challenge to GISD's policy limiting communications between TSTA and GISD teachers comprised the gravamen of the Plaintiffs' lawsuit. This challenge amounted to the central issue. The Plaintiffs did not prevail on this issue and did not achieve the results they sought.

(Pet. App. pp.19a-20a).

The Petitioners appealed. The Fifth Circuit affirmed the district court decision[7] and agreed that the central issue in the case was union access to GISD campuses and that the issue that Petitioners prevailed on was not the primary relief sought. Judge Goldberg dissented and "profoundly hoped" that this Court would grant certiorari in this case (Pet. App. p.15a). He agreed with the opinion's application of the central issue test to this case but disagreed with the Fifth Circuit's central issue standard itself. *Texas State Teachers Association v. Garland Independent School District*, 837 F.2d 190 (5th Cir. 1988). (Pet. App. p.1a).

SUMMARY OF THE ARGUMENT

The Fifth Circuit panel's decision applying the central issue standard to determine that Petitioners were not the prevailing party in this case is not contrary to the decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). The fact that *Hensley* did not adopt or approve any particular standard is apparent in subsequent Supreme Court cases

[7]Judge Jerre S. Williams, who wrote the opinion in the attorneys' fee decision, was thoroughly familiar with the case, having also written the opinion for the panel in the decision on the merits.

in which the *Hensley* decision is cited or discussed and this is particularly evident from a reading of *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, decided on July 1, 1983, only six weeks after the *Hensley* decision. *Ruckelshaus* discusses the variety of prevailing party standards being used by the courts and cites *Hensley* as an example of some of the standards without any indication whatsoever that *Hensley* established a particular definition of "prevailing party". In fact, *Ruckelshaus* stated that "the 'prevailing party' category was thought *not* to extend to those who prevailed only *in part*." *Id.* 468 U.S. at 689, 1035 S.Ct. at 3280.

While the Act may not have defined the term "prevailing party" per se, the legislative history makes it abundantly clear that the Act intended to adopt the prevailing party standard as it was being applied in civil rights cases prior to and at the time of enactment in 1976. At that time the interpretation of "prevailing party" was narrower than it is in most circuits today. In fact, some courts required not just some success but "substantial" success. *Ruckelshaus,* 463 U.S. at 689, 103 S.Ct. at 3279. This concept is further borne out by the legislative history of the Clean Air Act, passed in 1977, which allows attorneys' fees when the court determines that such an award is "appropriate". Congress chose an "appropriate" standard in order to avoid the restrictive interpretation placed on "prevailing party" and to expand the class of parties eligible for fee awards to include parties achieving only *some success* in their cases. *Ruckelshaus,* 463 U.S. at 689, 103 S.Ct. at 3279.

If Congress intended to award attorneys' fees to litigants who had achieved only some modicum of success in civil rights cases, then it would have established an "appropriate" standard rather than a "prevailing party" standard and thus broadened the reach of the Act. Requiring a quantitative

amount of success and a nexus to the action as originally brought is sound policy.

ARGUMENT

In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964 (1968), a suit brought under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a), to enjoin racial discrimination at some restaurants, this Court allowed an award of attorneys' fees[8] articulating the theory that plaintiffs in civil rights suits are acting as a "private attorney general" vindicating Congressional policy and that such fees should be allowed "unless special circumstances render such an award unjust." Sparked by this decision, the circuits developed a body of law applying the "private attorney general" theory as an exception to the American Rule on attorneys' fees and thereby allowing attorneys' fees in civil rights actions. See e.g. *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Fowler v. Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974). The D.C. Circuit Court of Appeals applied this court fashioned "private attorney general" fee exception in order to award a fee to the prevailing party in an environmental case in *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), which was reversed by the Supreme Court sub nom *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975). In *Alyeska*, this Court reaffirmed the American Rule and held that only Congress, not the courts, could carve out exceptions, such as for a private attorney general, thereby terminating fee awards for § 1983 and other civil rights cases.

Congress passed the Civil Rights Attorneys' Fees Award Act of 1976 in response to the *Alyeska* decision. S. Rep. No.

[8]Title II does provide that the prevailing party is entitled to reasonable attorneys' fees in the court's discretion.

94-1011, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p.5909.

In the absence of a statutory definition for "prevailing party", the courts fashioned a variety of formulations to determine when a plaintiff is a prevailing party entitled to attorneys' fees. The standards require varying degrees of success.[9]

The Fifth Circuit requires that a plaintiff prevail on the central issue by acquiring the primary relief sought in order to be a prevailing party. *Simien v. City of San Antonio*, 809 F.2d 255 (5th Cir. 1987). This is not a mystic formulation. It is simple and to the point as described in *Commonwealth Oil Refining Co., Inc. v. Equal Employment Opportunity Commission*, 720 F.2d 1383 (5th Cir.), at page 1385 of the opinion:

> The proper focus is whether the Plaintiff has been successful on the *central issue* . . . as exhibited by the fact that he has acquired the *primary relief sought*.

[9]The First Circuit standard adopted in *Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978) requires "success on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit". This standard has been adopted verbatim by the Second, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. *Gingras v. Lloyd*, 740 F.2d 210, 212 (2nd Cir. 1984); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979); *Kreimes v. Department of Treasury*, 764 F.2d 1186, 1188 (6th Cir. 1985); *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); *Fast v. School District of Ladue*, 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc); *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983); *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir. 1984). The Third Circuit requires that the Plaintiff as prevailing party achieve "some of the benefit sought" by bringing the suit. *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 910 (3rd Cir. 1985). The Federal Circuit requires that a prevailing party has "substantially prevailed in its position". *Austin v. Department of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984). The District of Columbia Circuit requires that the Plaintiff must have "substantially received the relief sought". *Miller v. Staats*, 706 F.2d 336, 341 (D.C. Cir. 1983).

> In many, if not most lawsuits, whether tried or settled, it is possible to compare the allegations made with the results obtained and pick out a winner . . . A Plaintiff who carried the day on his major claim, a Defendant who defeated the major thrust of the suit. In other cases it may be that neither party could fairly be said to have carried the day, and in such event, there should be no fee awarded to either.

The Eleventh Circuit has adopted the same standard by requiring that a prevailing party receive "substantially the relief requested or has been successful on the central issue." *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

I. THE PANEL DECISION IS NOT IN CONFLICT WITH THE DECISION IN *HENSLEY V. ECKERHART*.

The thrust of Petitioners' position is that this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), adopted the definition of prevailing party that was set forth by the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), and that the panel decision applying the central issue test is, therefore, in conflict with the *Hensley* decision. The *Nadeau* formulation only requires success on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit. *Nadeau, supra*, 581 F.2d at 278.

Nowhere in the opinion does this Court state that it has adopted the First Circuit's, or any other's, definition for a prevailing party. The *Hensley* opinion recognizes that the first inquiry is a threshold requirement that a plaintiff must be a "prevailing party" and a second inquiry regarding the amount of fees to which the prevailing party is entitled to receive. The opinion's entire discussion of prevailing party is limited to a single paragraph and footnote in the opinion.

The First Circuit standard is referred to only as "typical " and "generous". The Court placed no more of a stamp of approval or rejection on the First Circuit test than it did on the Fifth Circuit test cited in the footnote. The panel below, as well as other post *Hensley* Circuit decisions, has viewed the *Hensley* decision in this light.[10] Nor has this Court ever interpreted its own decision in *Hensley* to have established the standard for a prevailing party.

Since its decision in *Hensley* in 1983, this Court has had opportunity to cite or discuss the decision in 16 subsequent decisions by this Court.[11] None of these decisions have cited or interpreted the *Hensley* decision as standing for the proposition that it set forth a standard to determine who is a prevailing party. In fact, to the contrary, some of these opinions clearly indicate that the issue is still undecided by

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[10]". . . the Supreme Court's opinion does not state in so many words that the standard we have just quoted is the only permissible one under § 1988. The Supreme Court's opinion says only that the standard quoted is '[a] typical formulation' " *Fast v. School District of City of Ladue*, 728 F.2d 1030, 1032, n.2 (8th Cir. 1984).

". . . the Supreme Court did not prescribe one uniform articulation of the prevailing party standard in *Hensley*." *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 911 (3rd Cir. 1985).

[11]See *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517 (1983); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274 (1983); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984); *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970 (1984); *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457 (1984); *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 105 S.Ct. 1923 (1985); *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012 (1985); *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985); *Evans v. Jeff D.*, 475 U.S. 716, 106 S.Ct. 1531 (1986); *City of Riverside v. Rivera*, 473 U.S. 1315, 106 S.Ct. 5 (1985); *City of Riverside v. Rivera*, ___U.S.___, 106 S.Ct. 2686 (1986); *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957 (1986); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ___U.S.___, 106 S.Ct. 3088 (1986); *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 107 S.Ct. 336 (1986); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ___U.S.___, 107 S.Ct. 3078 (1987); and *Pierce v. Underwood*, ___U.S.___, 108 S.Ct. 2541 (1988).

this Court. For example, in *Hewitt v. Helms*, ____ U.S. ____, 107 S.Ct. 2672 (1987), Justice Scalia acknowledged the lack of definition to the term by stating: "whatever the outer boundaries of the term may be . . ." *Pennsylvania v. Delaware Valley Citizens' Council*, ____ U.S. ____, 107 S.Ct. 3078, 3081 (1987), continues to recognize the dual questions of entitlement and amount involved in attorneys' fees cases and cites the *Hensley* decision to mean that "attorney's fees are awarded to a prevailing party and only to the extent that party prevails." If, as Petitioners argue, the *Hensley* decision does away with the prevailing party distinction, then the *Pennsylvania* opinion should merely have referred to an award of fees to the extent that the party prevailed. There would have been no necessity for distinguishing between a prevailing party and the extent to which that party prevailed.

In *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274 (1983), decided on July 1, 1983, only six weeks after the *Hensley* decision, Justice Rehnquist set forth a lengthy discussion of the different interpretations for prevailing party without giving any indication whatsoever that the *Hensley* decision had settled the issue. In fact, the court stated that "indeed, even today, courts require that, to be a 'prevailing party,' one must succeed on the 'central issue.'" and cited *Hensley* for this proposition.

The Fifth Circuit has accepted the *Hensley* decision as a mandate to first ascertain that the plaintiff was the "prevailing party", then to set fees based on the degree of success of the prevailing party. See *Davis v. West Community Hospital*, 755 F.2d 455, 468 (5th Cir. 1985). The panel decision in this case follows that same analysis. (Pet. App. p.6a).

II. THE LEGISLATIVE HISTORY ESTABLISHES THAT THE CENTRAL ISSUE STANDARD IS THE APPROPRIATE STANDARD.

The Fifth Circuit's central issues test emanated from *Parker v. Matthews*, 411 F.Supp., 1059 (D.D.C. 1976), aff'd sub nom *Parker v. Califano*, 561 F.2d 320 (DC Cir. 1977), which was one of the cases cited as an example to be followed by the accompanying H. R. Rep. No. 94-1558.[12] The *Parker* decision adopted the Black's Law Dictionary. (Rev. 4th Edition 1968, p.1352) for "prevailing party" which was:

> That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention. (Citations omitted) . . . To be such [a prevailing party] does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, had successfully maintained it." [Citations omitted].

Parker, 411 F.Supp. at 1063.

The court went on to state that "prevailing party" status must be determined by:

> . . . a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the *central issue* . . . (emphasis added).

Parker, 411 F.Supp. at 1064.

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[12]The Fifth Circuit formally enunciated the central issue test in *Iranian Students Association v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979), citing *Howard v. Phelps*, 443 F. Supp. 374 (E.D.La. 1978), which relied on *Parker v. Matthews*, 411 F. Supp. 1056 (D.D.C. 1976).

The Clean Air Act, 42 U.S.C. § 7607(f), provides for an award of reasonable attorney's fees "whenever it [the Court] determines that such award is appropriate." The legislative history to that bill explains why an "appropriate" standard rather than a "prevailing party" standard was adopted by stating:

> The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, . . .

H.R. Rep No. 94-294, p.377 (1977) U.S. Code Cong. & Admin. News 1977, p.1416.

This Court had an opportunity to analyze the legislative history and determine what the "appropriate" standard was in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274 (1983). This Court first analyzed the meaning of the rejected term "prevailing party" and found that at the time of adoption of the Clean Air Act it had been interpreted in a variety of rather narrow ways including a requirement for "substantial" success. Based on the court's analysis of the interpretations of "prevailing party", it explained the rationale behind the Act as:

> Section 307 (f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties — parties achieving *some success*, even if not major success. Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

Mr. Justice Rehnquist went on to state:

> It is clear from the distinction drawn in these two passages that — as the case law discussed above fairly indicated — Congress understood "prevailing party" and "partially prevailing party" as two different things, with the former encompassing only a limited category of parties that achieved success in their lawsuits. The "prevailing party" category was thought *not* to extend to parties who prevailed only *in part*.

Ruckelshaus, 463 U.S. at 688, 689, 103 S.Ct. at 3279, 3280.

If the term "prevailing party" could conceivably extend to those who have prevailed only in part then Congress would have found it wholly unnecessary to have adopted such a separate and distinct standard of "when appropriate". And, if Congress had wished to extend attorneys' fees to a plaintiff who achieved only some degree of success, then it would not have restricted the award to prevailing parties, as that term was understood by Congress at the time. A comparison of these two standards is the clearest indication that "prevailing party" status does not attach to a plaintiff who only achieves some degree of success.

Such an interpretation also reflects sound judicial policy on the issue. The stated purpose of the Act is to ensure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, "but which do not produce windfalls to attorneys". Congress also intended to adopt the private attorney general standard set forth in *Piggie Park*. S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p.5913. Requiring a nexus between the success achieved and the reasons involved for bringing the suit co-exist with the private attorney general concept, while litigation brought in

hopes of finding a violation to support attorneys' fees will result in windfalls to attorneys contrary to Congressional intent.

Even if Petitioners were the prevailing party, they would not be entitled to the attorneys' fee they requested since the extent of their success is a crucial factor in determining the proper amount of an award under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 441, 103 S.Ct. at 1943. The degree of the Petitioners' success has a chameleon-like quality. What started out as an unpled issue is now posited by Petitioners as virtually their sole issue (Brief of Petitioners p.21). Yet, in their Motion ot Dismiss or Affirm in *Garland I* (No. 85-1890), these same issues were referred to as only two of a "number of claims below". (Motion to Dismiss or Affirm p.2.). These same issues were also labeled by Petitioners as "so insubstantial as to not need further argument." (Motion to Dismiss or Affirm p.6).[13]

Respondents would respectfully submit to this Court that it is neither Congressional intent nor sound judicial policy to allow a recovery of attorneys' fees in such a situation.

[13] This Court may take judicial notice of the briefs filed by the respective parties in the prior litigation formerly before it. *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 156, 89 S.Ct. 935, 942 (1969).

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request this Court to affirm the Fifth Circuit panel decision denying attorneys' fees to the Petitioners in this case.

Respectfully submitted,

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REPLY

BRIEF

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No. 87-1759

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TEXAS STATE TEACHERS ASSOCIATION,
GARLAND EDUCATION ASSOCIATION,
JOE ATKINS AND JANICE HILL,
Petitioners,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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TEXAS STATE TEACHERS ASSOCIATION,
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PETITIONERS' REPLY BRIEF

INTRODUCTION AND BACKGROUND

In light of the test used by the Fifth Circuit to determine whether a plaintiff is a "prevailing party" for attorney's fees purposes under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("§ 1988"), petitioners contended in the court below that the "central issue" in this case was whether the policy of respondent Garland Independent School District ("GISD"), embodied in Administrative Regulation 412, which prohibited all communications concerning employee organizations at any

time during the school day, violated the First and Fourteenth Amendments. Inasmuch as petitioners succeeded in having the Regulation declared unconstitutional to the extent that it prohibited teachers employed by GISD from discussing this topic among themselves, either face to face or by means of the GISD media facilities, petitioners argued that they were prevailing parties even under the Fifth Circuit's narrow test.[1]

The Court of Appeals disagreed. Because Administrative Regulation 412 affected two classes of communications—those among GISD's own teachers and those initiated by outside representatives of employee organizations—it held that the case should be divided into two discrete issues. Moreover, because it also determined that application of the Regulation to the latter class of persons was the central issue in the case, and petitioners had not succeeded in that regard, the court below held that they were not prevailing parties eligible for an award of attorney's fees under § 1988.

Petitioners did not seek review of the Court of Appeals' decision to divide the case into two discrete issues, or of its determination that petitioners had not prevailed on what the court considered to be the central issue. Focusing instead on the lower court's explicit acknowledgment that petitioners "did succeed on significant secondary issues by having Regulation 412 declared unconstitutional as it applied to teacher to teacher conversation and teacher use of school communications systems," 837 F.2d at 193 (Pet. App. 6a), and the fact that virtually all other Federal appellate courts have defined prevailing parties for § 1988 purposes as those who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,"

[1] Petitioners also argued that the "central issue" test was contrary to decisions of this Court and of other circuits, and should be abandoned. The Fifth Circuit rejected this argument.

837 F.2d at 192 (Pet. App. 5a), petitioners asked this Court to resolve this split in circuits in favor of the latter standard. Accordingly, the Question Presented in the Petition for Certiorari is whether "a plaintiff who obtains judgment in his favor on a significant claim in a civil rights lawsuit" is a prevailing party for attorney's fees purposes under § 1988, notwithstanding that "the claim on which he prevailed was not the 'central issue' in the litigation."

In their brief, respondents do not really address this question. They attempt rather to recast it by taking issue with the lower court's characterization of the merits outcome in the case, and assert that petitioners have achieved little more than a technical victory on an unpled issue that did not even surface until late in the course of the litigation. *See* Brief of Respondents ("Resp. Br.") at 3, 5, 7.[2] Because respondents so thoroughly distort the record, and because that distortion forms the predicate for so much of the legal analysis in the Brief of Respondents, it is appropriate to begin by making clear precisely what the court below did and did not hold on the merits.

The Court of Appeals struck down GISD's policy as applied to "private teacher conversations and use of school media facilities by teachers employed in GISD schools. . . ." *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046, 1055-56 (5th Cir. 1985), *aff'd mem.*, 479 U.S. 801 (1986) ("*Garland* I") (Pet. App. 38a). With respect to "private teacher con-

[2] Respondents' supporting amici—the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys—go even further, stating that "[d]espite the Fifth Circuit's characterization of the issues on which appellants prevailed as 'significant secondary issues,'" Brief of Amicus Curiae at 3, "[p]etitioners sought but received no judicial remedy, and there is little language that is favorable to them in the Fifth Circuit's opinion, reflecting nothing of significance," *id.* at 2.

versations," the lower court noted that respondents admitted that their policy prohibited teachers from "promoting" employee organizations in any such conversations—a prohibition which the court held to be flatly unconstitutional, 777 F.2d at 1054 (App. 34a-35a). The court further determined that respondents' policy actually extended so far as to prohibit "*any* discussions among teachers . . . relating to any teacher organization . . . ," even discussions that did not involve "promotion." 777 F.2d at 1053 (App. 32a) (emphasis by the court).[3] Respondents' contention that the Court of Appeals' decision with respect to teacher conversations was based on "hypothetical applications of Administrative Regulation 412," Resp. Br. at 5, ignores the policy's *admitted* unconstitutional ban on speech "promoting" teacher organizations; and it ignores, as well, the Court of Appeals' determination that the existence of GISD's broad ban on speech concerning employee organizations "chill[ed] teacher speech in violation of [the teachers'] First Amendment rights." 777 F.2d at 1055 (App. 36a). Thus, the Court of Appeals' decision striking down GISD's policy as applied to teacher conversations represented a clear and concrete victory for petitioners.

The same is true of the lower court's ruling regarding the use by teachers of the school mail facilities and bulletin boards for communications regarding employee organizations. Finding "no merit" in respondents' contention that a prohibition against such use was "proper because it preserves the neutrality mandated by the Texas

[3] Respondents assert that the court below erred in that interpretation of the policy, and they cite certain selected testimony of Superintendent Eli Douglas to support their position. Resp. Br. at 6 and n.4. *See also id.* at 8 and n.6. But whether petitioners *should* have prevailed is not before this Court: the fact is that they *did* prevail. In any event, other testimony by Superintendent Douglas, quoted by the court below, amply supports that court's interpretation of GISD's policy. *See Garland I*, 777 F.2d at 1054 n.9, Pet. App. 33a-34a.

Education Code," the Court of Appeals held "that GISD policies preventing teachers from using school . . . [media] facilities to mention 'employee organizations' are unconstitutional." 777 F.2d at 1055 (App. 37a).

As we have shown, the effort by respondents now to downplay the significance of these adverse rulings is squarely at odds with the positions they took previously in this case when they pursued every possible avenue in an effort to overturn those rulings, *see* Brief of Petitioners ("Pet. Br.") at 4-5;[4] and it is manifest that the

[4] Obviously recognizing the inconsistency between these earlier efforts and their current position regarding the significance of the issues on which petitioners prevailed in this case, respondents now explain that

> in their appeal to this Court, [they] were concerned that, while outside union access to the mail system was denied, the same could be achieved under the panel decision by simply handing the materials to a teacher who would then place same in the school mail for distribution to all other teachers as her "private communication." However, this issue was dispelled and resolved by this Court's subsequent decision in *Regents of the University of California v. Public Employment Relations Board*, —— U.S. ——, 108 S. Ct. 1404 (1988), which prohibits the use of the school's internal mail system for any purpose other than the school's official business.

Resp. Br. at 9. As we understand respondents' explanation, they suggest that the holding of the Fifth Circuit on the merits was important *only* because teacher access to the GISD mail delivery system could result in outside union access to that system, and that this concern is no longer relevant because of this Court's decision in *Regents of the University of California*. This explanation is absurd.

To begin with, respondents strove to overturn the decision of the Fifth Circuit in *Garland I* not only as it invalidated GISD's prohibition of the use by teachers of the school district's mail delivery system, but also as it invalidated the prohibition of access by teachers to bulletin boards and in-school mailboxes, as well as GISD's restrictions on private teacher conversations, none of which is in any way implicated by the decision in *Regents of the University of California*, which relates only to mail delivery systems. With regard to the mail delivery system itself, respondents sub-

Court of Appeals' characterization of the issues on which petitioners were successful as "significant" was, if anything, understated.

In a further effort to diminish the success achieved by petitioners *vis-à-vis* the right of GISD teachers to communicate on the subject of employee organizations, respondents assert that these claims were not pleaded in the complaint, but arose only in the course of discovery, and cannot, therefore, provide the basis for prevailing party status. Resp. Br. at 3-5. Respondents are mistaken with regard to both the facts and the law. In the first place, the claims *were* asserted in the complaint,[5] and

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stantially overread that decision when they assert that the decision "prohibits the use of the school's internal mail system for any purpose other than the school's official business." Resp. Br. at 9. Finally, whatever this Court may have held with regard to an employee organization's use of a school district's mail system *in 1988* has no bearing on the significance of the victory achieved by petitioners when *in 1985* the Court of Appeals struck down GISD's policy of allowing use of that system for all communications except those on the subject of employee organizations.

[5] Paragraph V(A) of the complaint, reproduced in the Joint Appendix at 10, states as follows:

> Defendants have also adopted policies and practices which expressly prohibit *Plaintiffs and the membership of the Plaintiff organizations* from utilizing the school mail service, distirbuting material directly into mail boxes at a school, and disseminating information, whether verbal or written, on school property and/or by means of bulletin boards, public address systems and other school district equipment.

(Emphasis added.) Since the plaintiffs included Janice Hill, a GISD teacher, and "the membership of the Plaintiff organizations" includes other GISD teachers, this paragraph of the complaint clearly alleged the unconstitutionality of the policy of forbidding communication among GISD teachers on the subject of employee organizations. So, too, paragraph III(A) of the complaint alleges that GISD's policy "expressly forbids group meetings or individual conferences conducted by elected officials of any employee organization" (Joint Appendix at 9), which would preclude plaintiff Janice Hill,

they received substantial attention from the outset of the case in discovery. *See* 777 F.2d at 1053-55 and nn. 9, 14 (Pet. App. 32a-37a) (discussing some of the deposition testimony on this subject). But, more to the point, respondents are unable to cite a single case in which any court has held that attorney's fees should be denied because the claim on which the plaintiff prevailed was not initially pleaded, but arose during discovery. Such a view would make no sense: under § 1988, attorney's fees are to be awarded when a plaintiff "vindicate[s] . . . important Congressional policies," *City of Riverside v. Rivera*, 477 U.S. 561, 578-79 (1986) (plurality opinion) (*see* Pet. Br. at 18-20), and there is no basis for concluding that Congress intended to limit that principle to claims asserted in an initial complaint, as distinguished from constitutional violations that come to light during discovery.

In sum, even if the Fifth Circuit were correct in concluding that petitioners did not prevail on the "central issue" in this case, they did, as the lower court readily acknowledged, "succeed on significant secondary issues," 837 F.2d at 193 (Pet. App. 6a); and respondents' contention that petitioners achieved "only some modicum of success" in this litigation, *see* Resp. Br. at 11, is inapt.

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the elected President of the Garland Education Association, from meeting with other GISD teachers who were members of the Texas State Teachers Association and the Garland Education Association. Section III(B) refers to a similar prohibition placed on "all employees, representatives, and members of the Texas State Teachers Association," *id.*, again including plaintiff Hill and other GISD teachers who, as the complaint alleges, are members of the Texas State Teachers Association.

ARGUMENT

The question presented in this case is whether plaintiffs who succeed on "significant secondary issues" are prevailing parties even though they have not been successful on the "central issue." In our opening brief, we demonstrated why the answer to this question is yes, showing specifically that *Hensley v. Eckerhart*, 461 U.S. 424 (1981), precludes the use of the central issue test (Pet. Br. at 9-16); that only the Fifth Circuit and its offspring, the Eleventh Circuit, have embraced the central issue test, whereas all other circuits have adopted a formulation under which plaintiffs qualify as prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (*id.* at 17-18); that the latter approach, not the central issue test, properly effectuates the intent of Congress (*id.* at 18-20); and that the central issue test requires the courts to engage in a complex inquiry that leads to unpredictable results and, contrary to the admonition of this Court, encourages further litigation rather than settlement of fee disputes (*id.* at 20-24). Respondents make relatively little effort to dispute these arguments, limiting their response to essentially the following three points:

1. "Nowhere in the [*Hensley*] opinion does this Court state that it has adopted the First Circuit's, or any other's, definition for a prevailing party," Resp. Br. at 14;

2. "[O]ne of the cases cited as an example to be followed" by the House Report accompanying the bill that became § 1988 was *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), in which the district court indicated that prevailing party status must be determined by considering, *inter alia*, whether the plaintiff was successful on the "central issue," Resp. Br. at 17; and

3. This Court did not, in its discussion in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), of the legislative history of the attorney's fee provision in the 1977 Clean Air Act, 42 U.S.C. § 7607(f), give "any indication whatsoever that the *Hensley* decision had settled the [§ 1988 prevailing party] issue," Resp. Br. at 16; and, according to respondents, the legislative history discussed in *Ruckelshaus* indicates that the legislators involved in the enactment of the Clean Air Act fee provision used the "separate and distinct standard of 'when appropriate'" because they understood "that 'prevailing party' status does not attach to a plaintiff who only achieves some degree of success." *Id.* at 19.

We deal with each of these points in turn below, and demonstrate that none of them justifies the use of the central issue test to deny prevailing party status to petitioners in this case.

1. *Hensley v. Eckerhart*

In contending that the decision of the court below is not in conflict with this Court's opinion in *Hensley*, respondents point out that "[n]owhere in the opinion does this Court state that it has adopted the First Circuit's, or any other's, definition for a prevailing party," Resp. Br. at 14, and that "this Court [has never] interpreted its own decision in *Hensley* to have established the standard for a prevailing party," *id.* at 15. On this basis, respondents argue "that the issue is still undecided by this Court." *Id.* at 15-16. This argument is fatally flawed.

As the court below acknowledged, and as other circuits have recognized, *Hensley* did "accept[]" the *Nadeau* formulation, 837 F.2d at 192 (Pet. App. 5a), and used that formulation as the basis for its analysis in the case. *See* Pet. Br. at 11-12 and n.7. Because respondents do not—and, of course, cannot—dispute this, a necessary consequence of their position is that it is appropriate for

the Fifth Circuit to use the narrower central issue test for determining prevailing party status, while other circuits apply the more "typical" and "generous" *Nadeau* formulation. But the definition of the term "prevailing party" is a matter of statutory construction, not a matter left to the discretion of each circuit. Thus, if the definition of prevailing party adopted in *Nadeau* is a proper one, as *Hensley* plainly indicates, it cannot be that the Fifth Circuit, or any other court of appeals, is free to adopt a markedly narrower definition.

Equally important, our argument regarding *Hensley* does not rest, as respondents appear to assume, on the single sentence in this Court's opinion, 461 U.S. at 433, that cites *Nadeau*. Rather, as we have demonstrated, the central issue test cannot be squared with other explicit statements in *Hensley*,[6] and with the entire thrust of the analysis in that case. *See* Pet. Br. at 12-16.

2. ***Parker v. Matthews***

In our opening brief, we asserted that the central issue test does not properly effectuate the intent of Congress, noting specifically that portion of the Senate Committee Report which explains that the award of fees *pendente lite* is "especially appropriate where a party has prevailed on an *important* matter in the course of litigation, even when he ultimately does not prevail on *all* issues." S. Rep. No. 94-1011, at 5 (1976), quoted in *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (first emphasis added; second emphasis in original). *See* Pet.

[6] *See* especially Pet. Br. at 15-16, discussing this Court's acknowledgment that the plaintiffs in *Hensley* would have been entitled to an award of fees even if they had been successful on only one minor claim, and that the plaintiff in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978), was a prevailing party even though she "had lost on the major issue" and had "obtained only a minor part of the relief she sought."

Br. at 18-20.[7] Respondents do not attempt to address this point, but simply note that the House Committee Report accompanying the legislation cited a district court decision, *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), which used the term "central issue" in defining prevailing party status. Resp. Br. at 17. But the House Committee Report cited *Parker only* for the following proposition:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

H.R. Rep. No. 94-1558, at 7 (1976).

That passage obviously cannot be read to reflect a congressional determination that attorney's fees should be awarded only where a plaintiff has prevailed on the

[7] The House Committee Report likewise makes it clear that "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered," H. Rep. No. 94-1558, at 8 (emphasis in original), and that interim awards are appropriate under § 1988. With regard to the standard that should be used in making such awards, the Report offers as a "guideline[]" the following passage from this Court's decision in *Bradley v. Richmond School Board*, 416 U.S. 696, 722 n.28 (1974): " '[T]he entry of any order that determines *substantial rights* of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . .' " *Id.* (emphasis added).

central issue, and such a limitation is not suggested anywhere else in the Report.[8]

3. *Ruckelshaus v. Sierra Club*

Respondents contend that this Court's decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), construing § 307(f) of the Clean Air Act, 91 Stat. 777, 42 U.S.C. § 7607(f) (1976 ed. Supp. V), which permits the award of attorney's fees in certain proceedings "wherever . . . [the court] determines that such award is appropriate," supports the use of the central issue test to define a prevailing party for purposes of § 1988. Resp. Br. at 16, 18-19. The issue in *Ruckelshaus* was whether an award could be considered "appropriate," under § 307(f), "to a party that achieved no success on the merits of its claims." 463 U.S. at 682. This Court answered in the negative, concluding that at least "some success on the merits [must] be obtained before a party becomes eligible for a fee award under § 307(f)." *Id.*[9]

[8] Indeed, *Parker v. Matthews* itself does not actually support the central issue test as adopted by the Fifth and Eleventh Circuits. The *Parker* court stated that "a party who settles his or her Title VII lawsuit *may* be a 'prevailing party' under the statute . . . [to] be determined by . . . [factors including] whether the party is the successful party with respect to the central issue—discrimination." 411 F. Supp. at 1064 (emphasis in original). By defining the central issue in a Title VII suit as "discrmination," the *Parker* court simply indicated that a plaintiff who settles his case may be deemed to have prevailed only if he was successful on some claim *arising under the statute invoked* in the suit. In that sense of the term, just as the plaintiff in *Parker* prevailed on the central issue of "discrimination," petitioners here prevailed on the central issue of "freedom of speech." The Fifth Circuit, however, uses the term central issue in a much narrower sense, as the present case illustrates. Thus, even if Congress could be said to have endorsed every word in *Parker*, this would not constitute congressional approval of the Fifth Circuit's narrow definition of prevailing party.

[9] Respondents note initially that although *Ruckelshaus* was "decided on July 1, 1983, only six weeks after the *Hensley* decision, Justice Rehnquist set forth a lengthy discussion of the different interpretations for prevailing party without giving any indication whatsoever that the *Hensley* decision had settled the issue." Resp. Br. at 16. Such an indication was not called for, however, inasmuch as the focus of this Court's discussion was on "what . . . [the prevailing party] standard was understood to mean . . . [w]hen § 307(f) was enacted [in 1977]." 463 U.S. at 687.

Respondents place primary reliance on the fact that, in analyzing the legislative history of § 307(f), the *Ruckelshaus* Court stated that:

> Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success. Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

Resp. Br. at 18, quoting *Ruckelshaus*, 463 U.S. at 688 (emphasis by Court). From this statement, respondents conclude that "the term 'prevailing party' . . . [cannot] conceivably extend to those who have prevailed only in part. . . ." Resp. Br. at 19. But this conclusion is patently incorrect.

As this Court has made abundantly clear, a plaintiff who achieves "only partial or limited success" in a civil rights suit *can be* a prevailing party under § 1988, *Hensley*, 461 U.S. at 436, and the legislative history of § 1988 unambiguously supports this position. *See* Pet. Br. at 18-20. Indeed, even the Fifth Circuit does not go so far as to endorse respondents' conclusion: in order to qualify as a prevailing party under that court's central issue test, a plaintiff need not have achieved *total* success.

Thus, *Ruckelshaus* cannot mean what respondents suggest. And a close reading of the decision indicates that neither the legislative history of § 307(f), nor this

Court's discussion of that legislative history, provides any support for the use of the central issue test to determine prevailing party status under § 1988.

This Court began its analysis in *Ruckelshaus* by observing that when § 307(f) was enacted, "the 'prevailing party' standard had been interpreted in a variety of rather narrow ways," 463 U.S. at 687, and the Court then proceeded to offer several examples of such "narrow" interpretations, without in any way suggesting that these were *correct* or even *generally accepted* interpretations. Thus, for example, this Court referred to the view of some courts that attorney's fees could not be awarded "to plaintiffs who lacked a formal court order granting relief," *id.* at 688, even though that position already had been expressly rejected in *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (plaintiffs "may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief"). By the same token, this Court's references in *Ruckelshaus* to cases in which courts had articulated narrow formulations of the quantum of success that a plaintiff must achieve to qualify as a "prevailing party" (such as *Best Medium Publishing Co. v. National Insider, Inc.*, 385 F.2d 384, 386 (7th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968), in which the court stated in *dictum* that a prevailing party is "the one who prevails as to the substantial part of the litigation," cited at 463 U.S. at 687-88; or *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26 (5th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982), in which the court stated in *dictum* that to be a prevailing party, one must succeed on the "central issue," cited at 463 U.S. at 688) were not intended to connote approval of those formulations.[10]

[10] The only statement in *Ruckelshaus* that refers to *current* construction of the term prevailing party is this Court's observation that "[i]ndeed, even today, courts require that, to be a 'prevailing party,' one must succeed on the 'central issue.'" 463 U.S. at 688. Although respondents rely on this statement to support their argument "that the *Hensley* decision had [not] settled the issue," Resp. Br. at 16, their reliance is misplaced. To begin with, respondents are in error when they state that that this Court "cited *Hensley* for this proposition." *Id.* The supporting citation was to *Coen v. Harrison County School Bd.*, *supra*, a 1981 Fifth Circuit decision, and *Hensley* was referenced following another quotation and citation as a "see also." In any event, this Court's statement should be taken for what it was: after indicating that the prevailing party standard "had been interpreted in a variety of rather narrow ways," 463 U.S. at 687, at the time Congress was considering § 307(f), this Court merely noted, without approbation, that even in 1983 there were still some courts—including the Fifth Circuit—that continued to apply the central issue test. This Court certainly did not mean to suggest that *all* courts, or even a majority, follow that approach; for it is beyond dispute that the central issue test is very much a minority view. *See* Pet. Br. at 17-18.

In fact, *Ruckelshaus*' discussion of the legislative history of § 307(f) cannot fairly be read to stand for any broader proposition than this: because the legislators who framed the attorney's fees provision of the Clean Air Act may have believed that the term "prevailing party" *might* be construed by *some* courts—whether rightly or wrongly—to require full rather than partial success (and to require, as well, that a plaintiff obtain "a formal order granting relief"), they opted instead for the term "appropriate" to make sure that such restrictive views would not be applied under that Act.[11] *See* 6

[11] In this connection, it must be recalled that the discussion in *Ruckelshaus* was addressed to the question whether a report of the House Committee on Interstate and Foreign Commerce, which stated that attorney's fees under the Clean Air Act should not be "restricted to cases in which the party seeking fees was the 'prevailing party,'" H.R. Rep. No. 95-294, at 337 (1977), *compelled* the conclusion that fees may be awarded to a plaintiff who lost on *every claim*. To reject that conclusion (which this Court described as a highly unlikely interpretation of Congress' intent, *see* 463 U.S. at 683-86, 690, 693-94), it was only necessary for this Court to find that the legislators responsible for the enactment of § 307(f) may have been concerned that the term "prevailing party" *might* be construed—whether rightly or wrongly—to require more than a minimal degree of success. If so, and if they wished to make sure that such a narrow construction would not be applied under the Clean

J. Moore, W. Taggart and J. Wicker, *Moore's Federal Practice* ¶ 54.78[4.-6] at 54-523 (1988):

> The majority [in *Ruckelshaus v. Sierra Club*] attributed the use of the term "appropriate" to the unsettled state of the law respecting who is a prevailing party at the time of the adoption of the statute.

There is, in short, nothing in *Ruckelshaus* to suggest that the restrictive interpretations of the term "prevailing party" that the legislators wished to exclude by using the term "appropriate" in § 307(f) were correct interpretations of the term, and it certainly does not follow that when Congress enacted the fees provision of § 1988, it intended for that term to be interpreted in any of the various "narrow ways," 463 U.S. at 687, to which this Court referred in *Ruckleshaus*.[12]

Air Act, then it would be reasonable to conclude that in rejecting use of the term "prevailing party," the legislators did not intend to authorize fees for a plaintiff who lost on every claim.

[12] Even if the reports of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Environmental and Public Works that are cited in *Ruckelshaus* had articulated a clear understanding of the meaning of "prevailing party"—which is not the case—there would be no basis for attributing that understanding to Congress as a whole; for in voting on § 307(f), there was no occasion for the legislators to consider, let alone agree upon, the meaning of a term—"prevailing party"—that was not contained in the legislation. *Cf. SEC v. Sloan*, 436 U.S. 103, 121 (1978). There is even less basis for assuming that the *prior* Congress that enacted the fees provision of § 1988 had in mind any possible interpretations of "prevailing party" that may have subsequently occurred to the members of the House Commerce and Senate Public Works Committees—committees that were not involved in the development of the fees provision of § 1988, which was the product of the Judiciary Committees of the respective chambers. *See generally United States v. American College of Physicians*, 475 U.S. 834, 846-47 (1986); *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 n.3 (1980); *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *United States v. Price*, 361 U.S. 304, 313 (1960).

It is also relevant to point out that when § 1988 was passed, countless cases had applied the concept of "prevailing party" under

Nor is it by any means self-evident that there is, as respondents suggest, a hierarchical relationship between the quantum of success required to meet the "appropriate" standard in § 307(f) and the quantum required to meet the "prevailing party" standard in § 1988. Indeed, *Moore's* takes a contrary position, observing that:

> The construction put upon the term "appropriate" appears to place Section 307(f) and statutes with similar wording at about the level of discretion as we have seen in the interpretation of the civil rights [attorney's fees] provisions.

6 J. Moore, W. Taggart and J. Wicker, *Moore's Federal Practice* ¶ 54.78[4.6] at 54-523. In support of this proposition, *Moore's* cites *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S. Ct. 3088 (1986), in which this Court was construing § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (1976 ed. Supp. V), which, like § 307(f), provides that a court may grant attorney's fees when "appropriate."[13] With regard to the relationship between § 304(d) and § 1988, this Court commented as follows in *Delaware Valley*:

Rule 54(d), F.R. Civ. P., which provides in pertinent part that ". . . costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Although we do not suggest that interpretations of Rule 54 are controlling here, it is noteworthy that the rule has not been construed as incorporating anything like the central issue test. *See generally* 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 2667 at 180-84 (1983); 6 J. Moore, W. Taggart and J. Wicker, *Moore's Federal Practice*, ¶ 54.70[4] at 54-323 to 325. *See also, e.g., United States v. Mitchell*, 580 F.2d 789, 793 (5th Cir. 1978) (costs are awarded under Rule 54(d) "if the prevailing party obtains judgment on even a fraction of the claims advanced"); *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471 (9th Cir. 1974) (plaintiff who was successful on only two of twelve claims is prevailing party under Rule 54(d)).

[13] In *Ruckelshaus*, this Court stated that "whatever general standard may apply under Section 307(f), a similar standard applies under Section 304(d)." 463 U.S. at 691.

> [T]he purposes behind both § 304 and § 1988 are nearly identical, which lends credence to the idea that they should be interpreted in a similar manner.
>
> • • • •
>
> Given the common purpose of both § 304 and § 1988 to promote citizen enforcement of federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner.

106 S. Ct. at 3095-96.

To the extent these comments mean that there is a parity between the attorney's fees provisions of the Clean Air Act and § 1988 in terms of the necessary quantum of success, the teaching of *Ruckelshaus* would appear to be that a plaintiff becomes eligible for an attorney's fee award under § 1988 (as he does under § 307(f)) if he achieves "some success on the merits." 463 U.S. at 682.

CONCLUSION

For the reasons set forth above and in petitioners' opening brief, the decision of the Fifth Circuit Court of Appeals should be reversed, petitioners should be declared "prevailing parties" for attorney's fees purposes under § 1988, and the case should be remanded for determination by the district court of a reasonable attorney's fee.

Respectfully submitted,

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BRIEF

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NO. 87-1759

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

TEXAS STATE TEACHERS
ASSOCIATION, et al.,

Petitioners

V.

GARLAND INDEPENDENT SCHOOL
DISTRICT, et al.,

Respondents

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE OUT OF TIME BY THE TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, AND TEXAS COUNCIL OF SCHOOL ATTORNEYS

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January 24, 1989

NO. 87-1759

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

TEXAS STATE TEACHERS
ASSOCIATION, et al.,

Petitioners

V.

GARLAND INDEPENDENT SCHOOL
DISTRICT, et al.,

Respondents

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE OUT OF TIME BY THE TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, AND TEXAS COUNCIL OF SCHOOL ATTORNEYS

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Texas Association of School Boards, The Texas Association of School Administrators, and the Texas Council of School Attorneys hereby respectively move for leave to file their Brief of Amicus Curiae, out of time, in support of the Respondents in this case.

Statement of Interest

The three associations involved in the filing of this brief are concerned about the impact of a reversal of the Fifth Circuit Court of Appeals decision in the present case.

The Texas Association of School Boards represents over 1,000 school boards from throughout the State of Texas, as well as Region Education Service Centers, special education cooperatives, junior colleges, and numerous other entities. Its member schools educate more than 99% of the total student population in Texas.

The Texas Association of School Administrators represents over 1,000 school district superintendents from across the state, each of whom is responsible for administering the day-to-day operations of virtually every school district in the state.

The Texas Council of School Attorneys comprises over 175 practicing attorneys who represent Texas school districts.

The three associations are nonprofit organizations in Texas whose membership consists of virtually all public school district boards of trustees, school superintendents, and school attorneys in the state of Texas. The three associations are active in their efforts to represent and assist local school districts and officials throughout the state, expressing the concerns of its members on issues of state and national importance in public education.

The granting of attorney's fees sought by Petitioners in the case at bar would adversely affect school districts and officials in the state who must implement policy that is, on its face, valid.

Petitioners in the case at bar originally lost on virtually all their claims brought before the courts and today seek to have attorney's fees awarded based on speculative testimony that is the basis of their claim to be a "prevailing party." Your Amici would show that the Fifth

Circuit's decision to deny attorney's fees is consistent with U.S. Supreme Court precedent.

Both parties to the case at bar have consented to the filing of this Amicus Curiae brief; both parties have consented to the filing of this brief out of time. Letters reflecting the consent of all parties to the filing of the brief and to the out of time filing have been filed with the Court.

The reason the granting of an extension of time is thought justified is as follows: The Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae was deposited with a private carrier rather than in a United States Post Office, your Amici having believed the arrival would have been more prompt. Had the deposit been in a United States Post Office rather than with a private carrier, such filing would have been deemed timely under U.S. Supp. Ct. Rule 28.2, 28 U.S.C.A. (1984).

WHEREFORE, Amici respectfully request that this Court grant to the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys leave to file their brief of Amicus Curiae in support of the Respondents and for leave to file said brief out of time.

Respectfully submitted,

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